

Volume 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

LISA GARVEY, individually and on)
behalf of all others similarly)
situated,)

Plaintiff,)

VS.)

No. C 11-2575 WHA

KMART CORPORATION, and DOES 1)
through 50 inclusive,)

Defendants.)

San Francisco, California

Tuesday

November 13, 2012

TRANSCRIPT OF PROCEEDINGS

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P R O C E E D I N G S

NOVEMBER 13, 2012

7:33 a.m.

THE CLERK: Calling No. 11-2575, Garvey versus Kmart Corporation. It's on for bench trial.

Counsel, can you please state your appearances for the record?

MR. MCINERNEY: Kevin McInerney for the plaintiff, your Honor.

MR. MATTHEW RIGHETTI: And Matthew Righetti for plaintiff.

MR. DOSTART: Zach Dostart for plaintiff.

THE COURT: Spell that last name for me?

MR. DOSTART: D-O-S-T-A-R-T.

THE COURT: Okay.

MR. MICHAEL RIGHETTI: And Michael Righetti for plaintiff.

MR. ADKINS: Rob Adkins on behalf of defendant Kmart, your Honor.

THE COURT: Adkins?

MR. ADKINS: Yes, your Honor.

THE COURT: Okay.

MS. SOMMERFELD: Amanda Sommerfeld on behalf of Kmart Corporation.

THE COURT: All right.

MS. SCHUMAN: Emily Schuman on behalf of Kmart

1 Corporation.

2 **MS. FIFE:** Joan Fife on behalf of Kmart Corporation.

3 **THE COURT:** F-i-f-e?

4 **MS. FIFE:** Yes, sir.

5 **MR. WOHL:** And Jeffrey Wohl for defendant Kmart
6 Corporation. Good morning, your Honor.

7 **THE COURT:** Good morning.

8 So welcome to everyone. We're here for a trial.

9 Again, many motions have been filed. We will get started
10 on a few of them, but we need to get the opening statements
11 underway. So whose motions were these?

12 **MR. MICHAEL RIGHETTI:** The plaintiff made a motion,
13 your Honor.

14 **THE COURT:** All right. Pick out your most important
15 one and let's hear that one first.

16 **MR. MICHAEL RIGHETTI:** Good morning, your Honor.

17 The most important aspect of plaintiff's motion relates to
18 the late disclosure of certain incredibly relevant evidence
19 that we received.

20 **THE COURT:** Just pick one of those groups. Don't pick
21 them all. We will get to them all in due course, but I want to
22 start with the one -- look, we've got a trial to run. You
23 lawyers think that every morning we're going to come in here
24 and deal with discovery objections ad infinitum. We'll deal
25 with most of that, but this is -- we're now at trial.

1 So let's be brief and get to the point. What is the --
2 what is your main issue on one group of documents, and in due
3 course we will get to the others.

4 These are not even in your case. This is for the defense
5 case, right?

6 **MR. MICHAEL RIGHETTI:** Your Honor, they may be in our
7 case as well. The most important one is the Checkout Exception
8 Reports. Let's start with that.

9 **THE COURT:** All right. Go ahead.

10 **MR. MICHAEL RIGHETTI:** And we received a disk on
11 Friday evening at the close of business that contains Checkout
12 Exception Reports, which the Court may recall were the subject
13 of many discovery issues throughout this case.

14 The defendant has said that those Checkout Exception
15 Reports were destroyed, written over every seven days.

16 On the Friday before trial we get all of the Checkout
17 Exception Reports that date back to October 2010 for the entire
18 class, entire class period. We were not expecting these. We
19 do not know where they came from. They show log on and log off
20 times.

21 **THE COURT:** All right. I understand that. Are these
22 documents you want to use in your case?

23 **MR. MICHAEL RIGHETTI:** They would have been very
24 relevant for us to be able to show how much time cashiers --

25 **THE COURT:** Answer my question. Do you want to use

1 them or not?

2 **MR. MICHAEL RIGHETTI:** Yes.

3 **THE COURT:** Then why are you complaining?

4 **MR. MICHAEL RIGHETTI:** Your Honor, we got them three
5 days ago. We have been asking for these since before
6 certification and the defendant has continually told us that
7 they have been destroyed and were unavailable.

8 How on the eve of trial are they able to reproduce all of
9 them for the entire class period? They have been making
10 representations to plaintiff and the Court that these have been
11 documents they don't have, data that is unavailable, that is
12 not maintained.

13 **THE COURT:** Okay. Let me hear from the defense.

14 **MS. SOMMERFELD:** Thank you, your Honor.

15 This is not a new issue. This was briefed, discussed,
16 argued and addressed --

17 **THE COURT:** Yes, it was. But how can you produce
18 something like this so late after telling me they did not exist
19 and could not be reconstructed?

20 **MS. SOMMERFELD:** We specifically in opposition to the
21 spoliation motion submitted a declaration of Mr. Ebert, which
22 is Document No. 136-2, in which Mr. Ebert explained that he was
23 going to undertake the extraordinary effort and resources to
24 create a code, process the data and recreate the Checkout
25 Exception Reports. He said he has begun this process. That

1 was set forth under oath in the declaration by Mr. Ebert in
2 opposition to the motion for discovery sanctions.

3 So the plaintiff knew that this was being undertaken. He
4 completed the 130 hours of reconstruction. We produced it.
5 Had we not produced it, there would have been an argument that
6 we didn't do what we said we did, your Honor. We did exactly
7 what we said.

8 **THE COURT:** Are these identical to the ones that were
9 destroyed?

10 **MS. SOMMERFELD:** Mr. Ebert believes so, yes.

11 **THE COURT:** That's an opinion.

12 **MS. SOMMERFELD:** They look the same to me, your Honor,
13 and he believes that they are identical.

14 **THE COURT:** Here is the ruling. Let me hear, does the
15 plaintiff have anything more to say on this subject?

16 **MR. MICHAEL RIGHETTI:** Your Honor, we will wait for
17 the Court's ruling.

18 **THE COURT:** Here is the ruling. If plaintiff wants to
19 use these documents, plaintiff can use them. Defendant cannot
20 use them.

21 They should have been produced a long time ago. If the
22 defendant wanted to use them, they should have done this months
23 ago.

24 So defendants cannot use these. Plaintiff has the option.
25 You don't have to use them. You can use them. If you feel

1 they help your case, great. If you don't want to use them, you
2 don't have to use them. If you do use them, I will give you
3 some latitude for discovery -- I'm sorry, for disclosure
4 violations to allow you to adjust within reason, but not
5 extravagantly. The reason the defendants cannot use these in
6 the absence of the plaintiff trying to use them first is, it's
7 too late.

8 All right. However, I will take this into account when it
9 comes time to deal with the sanctions issues on spoliation.

10 All right. End of first motion. What is your next
11 motion?

12 **MR. MICHAEL RIGHETTI:** Your Honor, the second relates
13 to the disclosure of the uniform policy that Kmart had also
14 said had been destroyed years ago.

15 **THE COURT:** Show me the documents so I can be sure. I
16 understand what you're talking about.

17 Is this the PowerPoint slide?

18 **MR. MICHAEL RIGHETTI:** Yes, your Honor.

19 **THE COURT:** I think I have that up here. Does it look
20 like this (indicating)?

21 **MR. MICHAEL RIGHETTI:** Yes, your Honor.

22 **THE COURT:** Do you want to use this document or not?

23 **MR. MICHAEL RIGHETTI:** Yes, your Honor.

24 **THE COURT:** Why are you complaining?

25 **MR. MICHAEL RIGHETTI:** Your Honor, we're complaining

1 because it's certainly suspicious, I suppose, that the
2 defendants' attorneys have had possession of this document
3 since May of 2012. Throughout --

4 **THE COURT:** The defendants' attorneys or the
5 defendants?

6 **MR. MICHAEL RIGHETTI:** The defendants' attorneys have
7 had this document since May of 2012, and we received it on
8 Thursday of last week.

9 **THE COURT:** How do you know that they have had it that
10 long?

11 **MR. MATTHEW RIGHETTI:** Ms. Sommerfeld told us that she
12 had it since May of 2012.

13 **THE COURT:** Is that true?

14 **MS. SOMMERFELD:** I did, your Honor. May I explain the
15 course of events?

16 **THE COURT:** Sure.

17 **MS. SOMMERFELD:** Ms. Grabau testified back in December
18 of '11 about the directive, as the Court is well aware. She
19 testified that there was one line in the PowerPoint
20 presentation that referenced it. She didn't remember exactly
21 what it was. She explained that her computer crashed. She did
22 not have the PowerPoint any more.

23 Approximately five months later she forwarded to me -- she
24 found it and forwarded it to me. I inadvertently did not act
25 upon the email, which I have informed Mr. Righetti immediately

1 when I learned last week during witness preparation that the
2 email and PowerPoint slide existed. I sent a letter to
3 Mr. Righetti with the slide. I explained when it was produced
4 to me. I explained that it was my inadvertent error for not
5 producing it.

6 I offered Ms. Grabau up for deposition immediately. They
7 accepted that offer. They are taking her deposition this
8 Thursday at 2:00 p.m.

9 And ultimately, your Honor, as the Court has addressed
10 this and referred to this policy directive numerous times in
11 numerous orders, Ms. Grabau will testify to the course of
12 events and the consistency between her deposition testimony and
13 the one line item in the slide.

14 **THE COURT:** Mr. Righetti, anything more?

15 **MR. MICHAEL RIGHETTI:** Your Honor, I think what's sort
16 of interesting here is what the defendant has been arguing
17 throughout the case, which is obviously a lot different than
18 what this document shows; that this is merely a directive. It
19 doesn't apply at the Tulare store. It is -- it's not a common
20 policy for all cashiers in California.

21 And while they are making these arguments to the Court
22 that we have to refute, they have a document in their
23 possession -- not only in the defendant's position, but in the
24 defendants' attorneys' possession -- that say something
25 completely different.

1 So I don't know what to believe any more. We're getting
2 these sort of half truths, if they are even half truths, about
3 what documents they have and what documents they don't have,
4 and now we're finally getting the documents 72 hours before
5 trial begins. I don't really have anything else to say other
6 than it's just -- it is incredibly suspicious.

7 **THE COURT:** Ms. Sommerfeld, anything more?

8 **MS. SOMMERFELD:** Your Honor, this was completely
9 inadvertent. The testimony --

10 **THE COURT:** How can it be inadvertent?

11 **MS. SOMMERFELD:** Your Honor, I accept full
12 responsibility. I --

13 **THE COURT:** You certainly should.

14 **MS. SOMMERFELD:** I do, your Honor.

15 **THE COURT:** And this is unacceptable behavior by any
16 lawyer. A document of this importance in the case was sent to
17 you in an email and you somehow forget to produce it? My, my,
18 my. I wonder what was going on?

19 **MS. SOMMERFELD:** Your Honor, I don't remember the
20 PowerPoint. I don't remember the email. All I know is that as
21 soon as it surfaced last week, I attempted to correct the
22 issue.

23 **THE COURT:** No, it surfaced back in May.

24 **MS. SOMMERFELD:** It did, your Honor.

25 **THE COURT:** It stayed on your computer, maybe other

1 places in your office, for many months. And then on the eve of
2 trial to avoid even more severe sanctions, you finally come
3 clean on it.

4 Now, I can't say that you did this on purpose. I'm going
5 to let Mr. Righetti take your deposition to find out.

6 So you can take her deposition, not -- sometime over the
7 coming weekend, you take the deposition of Ms. Sommerfeld, if
8 you wish, in addition to this other person. And I will
9 consider that testimony on the motion for spoliation sanctions.

10 But in the meantime the order is the same. You can use it
11 if you wish on the plaintiff's side. The defendants may not
12 use it. It's a late-produced document. However, if plaintiff
13 puts it in evidence, both sides can use it. That's the
14 immediate ruling.

15 But this is disturbing, Ms. Sommerfeld.

16 **MS. SOMMERFELD:** It is, your Honor. I assure the
17 Court that it was an inadvertent error and it is one I take
18 responsibility for.

19 **THE COURT:** Right.

20 Okay. What's your next motion?

21 **MR. MICHAEL RIGHETTI:** The next motion, your Honor,
22 relates to the demonstrative exhibits produced by Dr. Fernandez
23 and those, I think, the Court -- we have already briefed.

24 **THE COURT:** This one is an easy one. I see Mr. Wohl
25 is getting up.

1 Mr. Wohl, you can't use these late-produced things. How
2 can you justify that?

3 MR. WOHL: It's in response to their late prototype.

4 THE COURT: Their what?

5 MR. WOHL: Their late prototype. This thing of beauty
6 that's in the corner of the courtroom.

7 THE COURT: I thought they weren't going to use that
8 thing. I thought you withdrew it.

9 MR. MICHAEL RIGHETTI: We did withdraw it, your Honor,
10 but Kmart wanted to use it.

11 MR. WOHL: For good reason, your Honor.

12 THE COURT: No, you can't do that.

13 Mr. Wohl, you go ahead and say what you'd like. You might
14 persuade me. You're brand new to the case. Welcome.

15 MR. WOHL: Thank you, your Honor.

16 THE COURT: But I have been around the case. Let's
17 see here what you have to say. Go ahead.

18 MR. WOHL: I appreciate that, your Honor.

19 First off, all of Mr. Fernandez's reports were submitted
20 timely. There's no issue about that.

21 Number two, there's no issue --

22 THE COURT: The illustratives were not submitted
23 timely. Please don't say that.

24 MR. WOHL: I didn't say that, your Honor.

25 Number two, the prototype, was submitted untimely and

1 after they represented they weren't going to use the prototype.

2 Number three, the prototype is supposed to be the
3 embodiment of what their ergonomics expert, Dr. Johnson, said
4 could be done in a Kmart check stand to allow seating.
5 Dr. Fernandez did testify and in his report did point out the
6 fallacies in Dr. Johnson's proposed modifications.

7 The only thing that's changed now, your Honor, is that
8 once we got the prototype, we sent Dr. Fernandez over to assess
9 it. He did that. He created graphic slides, which do two
10 things: Demonstrate to the Court in a graphic easy-to-follow
11 way his critiques of Dr. Johnson's modifications, the same
12 issues they talked about in his report, in his deposition; and,
13 number two, comments specifically about this prototype as the
14 embodiment of those modifications. Those were given to
15 plaintiff's counsel within, I think, about four days, five days
16 after they prepared those slides.

17 If you look at the standard under 37(c)(1), they have to
18 show without substantial justification for the delay or actual
19 harm for the production.

20 And we cited to your Honor the *San Francisco Bay Keeper*
21 *versus West Bay Sanitary District* case decided by this District
22 in which the Court enumerated five factors to assess whether
23 evidence should be excluded because it was untimely under
24 37(c). And on Pages 2 and 3 of our response we ticked off each
25 and every one of those five points to demonstrate that there

1 has been no -- there was a substantial excuse for the delay.
2 Namely, it was all key to when this prototype was presented;
3 that there is no prejudice to the other side, because this is
4 simply tracking Dr. Johnson's testimony.

5 Dr. Johnson was here in the courtroom. He's going to be
6 their first witness. He's fully prepared to say whatever he
7 wants to say in response to Dr. Fernandez's critiques of his
8 modifications and this prototype.

9 So, your Honor, what this really comes down to is they
10 don't want you to see these graphic slides which explain in a
11 very clear way why Dr. Johnson's modification simply will not
12 work.

13 We're trying to get at the truth of this matter, your
14 Honor. We are trying to figure out: Can seats be used in the
15 check stand. Why would your Honor want to deliberately
16 exclude evidence that would show it?

17 **THE COURT:** The old get at the truth thing is a very
18 good line, but the rules -- to get at the truth, we have rules
19 and the rules are designed to fairly get at the truth.

20 Have you finished? I interrupted you. I want to make
21 sure you finished your argument.

22 **MR. WOHL:** No, your Honor. I was going to agree with
23 that completely.

24 **THE COURT:** Go ahead.

25 **MR. WOHL:** That is correct, but, again, this was not

1 that we delayed. This was that they delayed. Having delayed,
2 they are in no position to say: Well, you can't do something
3 because you delayed, when we simply reacted to what they did.

4 So, your Honor, the reason for our delay was their delay.
5 No prejudice to their position whatsoever. Important evidence
6 we think to help illustrate Dr. Fernandez's critiques of Dr.
7 Johnson's modifications.

8 We think you would be in a far better position to decide
9 this case if you can see those slides than to exclude them the
10 way plaintiff wants them to be excluded.

11 **THE COURT:** All right. Ready for a ruling?

12 **MR. MICHAEL RIGHETTI:** Sure, your Honor.

13 **MR. WOHL:** Thank you, your Honor.

14 **THE COURT:** All right. Here we go. Rule 26, this is
15 the Federal Rules of Civil Procedure, say that:

16 "Under the expert disclosures the report of the expert
17 must include any exhibits that will be used to
18 summarize or support them, referring to the opinions
19 of the expert."

20 So without any question, the illustrative material that
21 was going to be used by this expert should have been attached
22 to his expert report.

23 Lest there be any doubt about that, the case management
24 order in this case said in paragraph seven:

25 "Illustrative animations, diagrams, charts and models

1 may be used on direct examination only if they were
2 part of the expert's report, with the exception of
3 simple drawings and tabulations that plainly
4 illustrate what is already in the report."

5 So that was in the CMO, case management order, long ago.

6 In addition, the guidelines that the Court has for trials
7 says the same thing:

8 "Illustrative animations, diagrams, charts and models
9 may be used on direct examination only if they were
10 part of the expert report."

11 Now, the reason I put all that in there is because of the
12 recurring problem of just what we have here, of last minute
13 attempts to lard the record and beef up expert reports that are
14 insufficient. Maybe not insufficient, but the lawyers think
15 they are insufficient and they want to lard -- lard it up with
16 more charts and diagrams.

17 Now, that's not the end of the story. If, in fact, it
18 were true that the plaintiff's expert was going to go beyond
19 the four corners of his report -- in other words, if the
20 plaintiff's expert goes beyond the four corners of his report
21 on direct examination -- not on cross, but on direct
22 examination -- and that is somehow permitted, then the Court
23 would consider allowing the defendant expert to do the same
24 because what's good for one is good for the other.

25 That does occur in trials. In fact, I would say it occurs

1 about 50 percent of the time, but it doesn't always occur.

2 Now, what happens in this case? Mr. Wohl cited the record
3 almost correctly, but he left out one important fact. It is
4 true that the original report of the plaintiff expert referred
5 to this model, which is now reconstructed and looks like put
6 into the courtroom. I see it over there.

7 For the record, it looks like something that might be sold
8 at the Home Depot. It's a large mock-up made out of ply board.

9 **MR. WOHL:** By a standing cashier, I might say, your
10 Honor.

11 **THE COURT:** However, an objection was made by the
12 defendant. That's the part that Mr. Wohl keeps leaving out.
13 An objection was made by the defendant, a vigorous objection.

14 Now, Mr. Wohl was not here when that objection was made,
15 and I don't blame him for not knowing about that. But I was
16 here and I do remember. It was vigorously made, it was made up
17 and down. So finally the plaintiff said: We will withdraw our
18 reliance upon and the expert won't even mention that mock-up.
19 So that solved the problem. The mock-up was out.

20 Well, just as I suspected, the defendants actually
21 secretly wanted to have that mock-up because I guess they
22 thought it proved their case.

23 I don't know why they ever objected to it in the first
24 place. They wanted to have it both ways. Well, too bad for
25 the defendants. They managed to get it withdrawn over their

1 vigorous objection that it should never have been -- ever see
2 the light of day in the courtroom. Well, then they won that
3 point.

4 Now, they want to use it and they are the ones, I assume,
5 who went out and subpoenaed that to have it brought in, right?

6 **MR. MICHAEL RIGHETTI:** Yes, your Honor.

7 **THE COURT:** Okay. So I said you could subpoena it to
8 bring it back in, but that doesn't -- now that becomes part of
9 your affirmative case, Mr. Wohl. And that is not an excuse for
10 at the last minute enlarging upon your report.

11 So I'm going to make a tentative ruling and I'll tell you
12 why it's tentative in a minute. A tentative ruling is none of
13 these -- none of these contested materials are timely and they
14 should not be used.

15 However, here is the part that has to make that tentative.
16 I've seen enough trials to know that by the time we get to the
17 defense case, it could easily be the case that the plaintiffs
18 themselves, through their own examination of their own
19 witnesses, have enlarged upon what their own expert has said.
20 And you have to distinguish between cross where it's -- the
21 defense tries to shoe horn it in versus where the plaintiff
22 themselves bring it up.

23 But if at the end of the plaintiff's case the Court
24 believes that it would -- that the discovery -- sorry, the
25 disclosure violation should be excused for substantial

1 justification, then I'm going to allow these to be used at that
2 point. It's too premature for me to say. I don't want to make
3 that call right now.

4 I'm just tentatively -- I'm tentatively ruling they should
5 not come in, but there are many avenues that the plaintiffs
6 could shoot themselves in the foot and open the door to this.

7 So, Mr. Righetti, you should be careful in how you
8 approach your case. And don't ask me for advisory opinions.
9 I'm not going to fall for that. If you -- if you step over the
10 line, these are going to sail in. If you -- at least for
11 illustrative purposes. If you don't step over the line, then
12 you can keep them out. You have to use your own good judgment
13 as to where that line is. End of that story.

14 What's your next motion?

15 **MR. MICHAEL RIGHETTI:** I don't have any other motions,
16 your Honor. Thank you.

17 **THE COURT:** Does the defense have any more motions?

18 **MR. WOHL:** No, your Honor.

19 Did you mention about the trial briefs, just so we have
20 that clear?

21 **THE COURT:** I have an issue I would like to make sure
22 you brief, but I -- because I have been thinking about your
23 case.

24 But go ahead. What did you want to say?

25 **MR. ADKINS:** I just have a couple of house cleaning

1 items, your Honor, to hopefully streamline things.

2 We have reached and conferred with opposing counsel and I
3 think we reached stipulation on a very large portion of the
4 relevant exhibits. I just wanted to inquire of your Honor how
5 you would like us to handle that? Would you like us just to
6 read that into the record as to the admissibility of those
7 exhibits?

8 **THE COURT:** It would be a good idea if you could just
9 give me a document that says Exhibit No., whatever it is, 3175,
10 received in evidence.

11 **MR. ADKINS:** We'll do that, your Honor.

12 **THE COURT:** All right. Now, let's be clear on this
13 for both sides, because sometimes the lawyers -- if you
14 stipulated into evidence, then you don't need to -- it comes
15 into evidence. It's there for whatever value it is. A witness
16 need not even refer to it for the Court to rely upon it later.

17 So don't come back and later say, "Oh, that document was
18 never explained." You can say that for purposes of whether or
19 not it's persuasive, but you can't say that for whether or not
20 it can be considered at all.

21 I assume that's what you mean when you stipulate something
22 into evidence; true?

23 **MR. ADKINS:** Yes, your Honor. And these are videos
24 and photographs and business records that I think both sides
25 plan on using in this case.

1 **THE COURT:** That's fine. We all understand it the
2 same way, Mr. Righetti?

3 **MR. MICHAEL RIGHETTI:** Yes, your Honor.

4 **THE COURT:** Okay. What's your next point?

5 **MR. ADKINS:** Your Honor, I just wanted to inquire
6 about whether your Honor wants closing argument in this case.
7 I think you made mention of that.

8 **THE COURT:** Yes, probably we will, but let's wait and
9 see. When that will be and how long that will be is going to
10 be a different issue. I don't want to decide that right now.

11 **MR. ADKINS:** And would you like post closing briefing,
12 your Honor?

13 **THE COURT:** Yes. Yes. I'm going to give you probably
14 today or tomorrow a procedure that we will follow on findings
15 of fact and conclusions of law.

16 **MR. ADKINS:** Very well, your Honor.

17 The final issue is I wanted to confirm whether witnesses
18 are excluded.

19 **THE COURT:** Yes, they are all excluded. If you all
20 want to let the experts stay, that's fine. If you disagree
21 over the experts, we'll hear argument on that.

22 **MR. WOHL:** Well, we had asked the other side about
23 allowing an expert to sit in on an opposing expert's testimony
24 and we were told, no, they would not go along with that, so we
25 didn't have our expert come out.

1 So we think the rule should be all experts should be
2 excluded the same as fact witnesses. They, obviously,
3 shouldn't be able to now change course given their position
4 they would not allow experts to sit in.

5 **THE COURT:** What do you have to say about that, Mr.
6 McInerney?

7 **MR. MCINERNEY:** Sounds fair to me.

8 **THE COURT:** Once they have testified and never will
9 come back under any circumstance, they can sit in as ordinary
10 civilians; but until that happens, they are excluded.

11 **MR. WOHL:** And, your Honor, does the --

12 **THE COURT:** Except for corporate representatives and
13 the plaintiff.

14 **MR. WOHL:** Your Honor, does your admonition no
15 discussion with a witness during the cross-examination phase
16 also apply to expert witnesses?

17 **THE COURT:** Of course. Yes.

18 **MR. WOHL:** Just want a clarification.

19 **THE COURT:** Only on cross.

20 **MR. WOHL:** Only on cross.

21 **THE COURT:** Yes, Mr. McInerney.

22 **MR. MCINERNEY:** Two housekeeping.

23 Does the exclusion also exclude them during opening
24 statements?

25 **THE COURT:** I don't care. What do you two say?

1 **MR. WOHL:** I think we probably should, your Honor, be
2 consistent. If the whole point is to avoid them somehow being
3 tainted, that I think they should be excluded from opening
4 statements that refer to evidence. So I would suggest doing
5 the same there, too, your Honor.

6 **THE COURT:** All right. We'll exclude them from the
7 opening statement, too.

8 What else, Mr. McInerney?

9 **MR. McINERNEY:** Your Honor ordered at the pretrial
10 that on the morning of trial Kmart would disclose to us which
11 of our absent class members they are really going to call.

12 **THE COURT:** I think I did say something like that. I
13 don't remember that way I worded it, but what's the problem?

14 **MR. McINERNEY:** I just want their names.

15 **THE COURT:** Have you provided the answer?

16 **MR. WOHL:** I think we did, your Honor. Did we not
17 provide a rolling witness list?

18 **MS. SOMMERFELD:** We provided it with all the class
19 members name on them.

20 **MR. WOHL:** Yes, your Honor. We provided that a couple
21 days ago.

22 **MR. McINERNEY:** Three of them?

23 **MS. SOMMERFELD:** Correct.

24 **MR. McINERNEY:** Okay. Thank you.

25 **THE COURT:** Here is the issue that I hope that you can

1 all brief for me. But before I do it, remind me what the exact
2 wording of the statute is? I don't want approximations. Read
3 into the record for me the exact wording of the statute.

4 **MR. WOHL:** Section 14 of the Wage Order 7-2001 says:
5 "When the nature of the work reasonably permits it,
6 the employer shall provide a suitable seat."

7 **THE COURT:** All right. Here is the issue that has
8 occurred to me, and this is based upon other aspects of
9 California Labor Law, and that is: What deference is given to
10 the management's view in the matter as to whether or not it's
11 reasonable?

12 To put it differently, does the judge just decide on his
13 own what's reasonable and not reasonable, or does the judge
14 instead say: Was it -- was the view -- assuming that -- not
15 assuming, but assuming that it's proven, that the management
16 actually thought and made a considered judgment that seats were
17 not required, if the judge decides reasonable people could
18 differ over that and that was at least a reasonable decision,
19 does the judge have to defer to that business judgment even
20 though the judge, if he was making the decision, would come out
21 the other way? Do you understand the difference?

22 **MR. WOHL:** Yes, your Honor.

23 **THE COURT:** Yes, Mr. Wohl.

24 **MR. WOHL:** I didn't mean to interrupt, your Honor. I
25 was just going to say very much so. In fact, this issue has

1 been thoroughly briefed in other seats cases.

2 **THE COURT:** Well, has it been briefed in this case?

3 **MR. WOHL:** I don't know, your Honor, since I'm new,
4 but I assure you that if you look at --

5 **THE COURT:** I'd like each side to put in a five-page
6 brief by -- today is Tuesday. Say, Thursday when we start.
7 Can you -- if you need more time, I'll give you more time.

8 **MR. WOHL:** That's eminently doable, your Honor.

9 **THE COURT:** Is that doable on your side?

10 **MR. MCINERNEY:** Yes, your Honor.

11 **MR. MATTHEW RIGHETTI:** Yes, your Honor.

12 **THE COURT:** All right. I don't know the answer to
13 this. I do know that in other aspects of California law -- I
14 think, for example, in the area of wrongful discharge -- not
15 where you have an issue of race or gender or some other suspect
16 category, but where you have just was it fair to -- and
17 reasonable to discharge this person, I think the law says you
18 have to defer to management's view on the matter as long as
19 it's a reasonable judgment.

20 I don't know that that's true, and I don't know what the
21 rule ought to be here. But thinking about this case over the
22 last few days, that thought occurred to me and I would like to
23 have your input.

24 Now, I would also like to know whether or not there ever
25 actually was a considered judgment by the defendant. In other

1 words, was there a meeting where they sat down and decided we
2 do or do not need to have chairs. There is a decision memo.

3 I don't know how the decision would be implemented, but as
4 part of that, does there actually have to be proof that there
5 was, in fact, a decision and maybe even what it was based upon,
6 or is it just enough that that's the way it kind of played out
7 in the history of the particular company?

8 Anyway, these are things please address in a five-page
9 memo. You can bring to it court on Thursday.

10 **MR. WOHL:** Yes, your Honor.

11 **THE COURT:** Great. All right. Any other things to
12 bring up right now?

13 **MR. ADKINS:** No, your Honor.

14 **THE COURT:** So, here is what we're going to do. We're
15 going to proceed to opening statements. If we have anyone in
16 the courtroom who thinks they may be a witness in the case,
17 please step outside. I'm sorry to do this to you, but that's
18 the rule. But if you're not going to be a witness in the case,
19 you're welcome to stay. So there we are.

20 (Brief pause.)

21 **THE COURT:** All right. At this time --

22 **MR. MICHAEL RIGHETTI:** Your Honor, if I may introduce
23 the Court to our plaintiff, Lisa Garvey, who is here.

24 **THE COURT:** All right. She should sit at counsel
25 table, if she wishes. She doesn't have to.

1 Are you Ms. Garvey?

2 **MS. GARVEY:** Yes, sir.

3 **THE COURT:** Welcome to the court. How are you today?

4 **MS. GARVEY:** Fine, sir.

5 **THE COURT:** Great. Please have a seat.

6 All right. At this time on behalf of Ms. Garvey the
7 plaintiffs may make their opening statement.

8 **OPENING STATEMENT**

9 **MR. MCINERNEY:** The 1960's Irish folk group The
10 Clancey Brothers once introduced a song by saying, "We're going
11 to sing you a little Irish ditty. It's so short and it's so
12 simple we have to explain it at some length."

13 The Wage Order in this case is one sentence long. It
14 contains 21 words.

15 Could we put up 358?

16 (Document displayed.)

17 It's the top part, 14-A, that we are addressing in this
18 case. And I -- I want to also welcome Paul Hastings to this
19 case. They will be of great help, I'm sure, in explaining this
20 one sentence.

21 The Court will recall that attempts have been made to add
22 onto the one sentence. And, for example, we had a suggestion
23 that we should insert the words "if requested, the employer
24 shall provide." "If requested."

25 The second part of the Wage Order that I got there on

1 Exhibit 358, that's Section 17 down there at the bottom. And
2 basically I think that will help explain to the Court what the
3 focus of the preceding wage conditions are. It talks about how
4 an employer, if it feels that it can't meet the requirements of
5 any of the wage orders, including the seating requirement, can
6 apply for an administrative exemption; but what's important is
7 that the employer has to show that it wouldn't adversely impact
8 the welfare or comfort.

9 Now, Dr. Johnson is our expert on ergonomics, and he's
10 going to be talking about where comfort comes in. Because
11 according to Dr. Johnson, there's sort of a rising scale that
12 we experience in anything we do. It starts with effort, and
13 the next step -- and we all have effort, whether we're sitting
14 or standing at a podium. The next step up is fatigue, and then
15 you get to discomfort.

16 Now, the Wage Orders are geared to protecting employees
17 from discomfort. They talk about the comfort or welfare.
18 Beyond that, you know, we get into things that other experts
19 may want to talk about, but really aren't too relevant for our
20 consideration of Section 14 because you go through effort, then
21 there is fatigue, and then there is discomfort, and then you
22 escalate up to pain, injury, and ultimately disability.

23 And what Dr. Johnson will be talking about in large
24 measure is not -- of course, I hope this goes almost without
25 saying. We're not suggesting that every Kmart employee be

1 issued a seat. Like, "Here, Mary, here is your seat." Like a
2 uniform. We're obviously suggesting that seats be provided at
3 the work station. And the work station for the cashier is the
4 register.

5 And what Dr. Johnson is talking about is not having seated
6 cashiers like he'll tell you they have in Europe, but rather
7 having a sit/stand option. And we utilize that, of course, in
8 our everyday lives.

9 Of course, you know when you have to stand up to move
10 something heavy. If you have to move a little file on your
11 desk, you reach over and you move it. If it's a big file, like
12 this case has gotten to be, you may have to -- you'll naturally
13 stand up and move it.

14 But what Dr. Johnson -- the word he's going to be using a
15 lot is recovery. And the idea behind that, he'll explain, is
16 that even though you may have to stand to do some of the work,
17 the fact that you can sit down at least some of the time gives
18 you recovery, and that cuts into the fatigue which eventually
19 creates discomfort.

20 Dr. Johnson will be focusing on the nature of the work and
21 that's really the central theme because that's what the Wage
22 Order says: When the nature of the work reasonably permits the
23 use of a seat.

24 I wonder if we can put up Exhibit 156?

25 (Document displayed.)

1 And we have sort of a happy convergence in this case
2 because we have the Kmart job description. There's actually
3 two. This is the first one in time and it covered most of the
4 class period.

5 But the reason I say we have a happy convergence is it
6 talks about the nature of the job when we go down the page, but
7 let's just, if we will, we'll start out, this is the checkout
8 service associate. The pay grade level is one. It's a minimum
9 wage job. And the -- you see the general summary at the top:

10 "Provide 'World Class' customer service by surprising
11 and delighting our customers every day. Able to run
12 fast and efficient cash register operations.
13 Observes customer traffic and calls for additional
14 service as needed."

15 And then it lists all the essential functions. We will
16 get into that in detail with our cashier witnesses and with Dr.
17 Johnson.

18 But if the Court later looks at this Exhibit 156, the
19 Court will see that I think all but one of these essential
20 functions can actually be performed while seated.

21 They have this other thing that Kmart likes to do called
22 Operation Invitation, and that is if a cashier -- they have got
23 a light on, which indicates they are open for business. It's
24 up on a pole, like in a lot of stores. But they are also
25 supposed to go out and invite customers, "Hey, I'm open for

1 business. Come into my lane." That obviously, the way things
2 are set up, would have to require standing.

3 Can we slide that up a little?

4 This is what I was trying to focus on, the nature of the
5 job. There is a disclaimer. It says:

6 "This job description describes the general nature of
7 the duties and requirements of the job."

8 Of course, it goes on to say, you know, you may be
9 assigned to do other things by the managers.

10 But there it is. It's a confluence -- I think that's the
11 right word -- with what the Wage Order says. You focus on the
12 nature of the cashier's work. And here we have it described:

13 "The nature of the duties and requirements of the job."

14 Now, could you put up 157?

15 (Document displayed.)

16 Thanks.

17 In March of this year Kmart updated its job description.
18 So this one is called "Internal Job Description" at the top.
19 And, again, this is your checkout person or checkout service
20 associate.

21 And about six lines down it explains what the scope of
22 responsibility is:

23 "The cash register operation area within store/unit
24 location."

25 So the scope is really focused on the register. There,

1 again, the nature of the work. And a couple lines underneath
2 it says:

3 "What's the job summary? Provides 'World Class'
4 customer service by surprising and delighting our
5 customers every day. Able to run fast and efficient
6 cash register operations. Observes customer traffic
7 and calls for additional service as needed."

8 And, again, they list the primary job duties and
9 responsibilities. And as we go through these, your Honor, with
10 the -- I think we've got six cashier witnesses. Hopefully,
11 obviously, if it becomes repetitive, we'll cut it even shorter,
12 but they should be pretty short witnesses. They will be
13 talking about what they do at the register and it's going to
14 coincide, I expect pretty much, with what the job description
15 says.

16 And Dr. Johnson will also be addressing these, as he's
17 observed these functions performed. Dr. Johnson will testify
18 that in addition to, you know, actually going out to Kmart
19 stores himself, he's reviewed a lot of video footage that was
20 provided by the defendants, surveillance. Dr. Fernandez did
21 videos, some other expert did videos. So Dr. Johnson has been
22 able to observe these cashiers.

23 The testimony of the cashiers and of Dr. Johnson, in
24 essence, will be that cashiers scan, electronically scan the
25 items and put it into a bag. That's the heart of it.

1 So what's happening is that we have another add-on here.
2 Just like earlier there was an attempt to graft on some words
3 to that one sentence in 14-A. You know, "if requested." The
4 new add-on is not "nature of the work," but "nature of the work
5 station." So now we have a lot of emphasis on the work
6 station.

7 But, of course, the Wage Order doesn't mention work
8 station. It mentions the nature of the work.

9 And the defendant's position, as they will articulate in
10 their witnesses, as they have in the past through declarations
11 and argument, is basically: Look, this is our work station.
12 You can't require us to change it.

13 And, of course, we conceded, your Honor, at the
14 pretrial -- and I don't think we've really made a secret of
15 it -- that you can't use a seat at a Kmart checkout counter
16 without modifying the work station. There is no room for your
17 knees. There is no place to put your knees. And because there
18 is no place to put your knees, there's also -- if the cashier
19 elects to stand, either because they are tired of sitting or
20 they have to do a certain transaction that requires them to
21 stand, there is no place to push the stool.

22 And our position has always been that, yeah, you've got to
23 modify your work station because the law is the law. And if
24 the nature of the work requires that you provide a seat, you
25 can't defeat the law by designing or maintaining, you know, a

1 work station that can't accommodate a seat. It would be like
2 if GSA put a barrier in front of a judge's bench so the judge
3 could not put his knees under the bench. We think this is
4 supported not only by the Wage Order, but by the history.

5 In case this Court missed it, I wrote a pretty boring
6 trial brief. The first seven pages were sort of a history of
7 the Wage Orders which, you know, started in 1920.

8 And we have this idea that we're, of course, smarter than
9 our fore-bearers and -- but, and so the Wage Orders must have
10 been quite primitive. But I want to read you from the Wage
11 Order of 1920 because this, I think, is a relevant exhibit.
12 It's Exhibit 179 for the record, and it's also document 171-1.

13 Now, back in 1920 Section 14 was actually Section 23. And
14 just like 14 today has an A and B that pertain to when you're
15 working, that's A or B, when you're -- there is a lull in
16 business and, you know, you can sit down, but when normally
17 your work requires standing, like a salesperson. If there is
18 nobody around, you know, that's a lull.

19 So 14-B, this is 92 years ago says:

20 "Seats shall be provided at work tables or machines
21 for each and every woman or minor employed."

22 That's sort of interesting because I think until '73 the
23 California Wage Orders didn't protect men. They only covered
24 women and children. So:

25 "Seats shall be provided at work tables or machines

1 for each and every woman or minor employed, and such
2 seat shall be capable of such adjustment and shall be
3 kept so adjusted to the work tables or machines that
4 the position of the worker relative to the work shall
5 be substantially the same whether seated or standing.
6 Work tables, including sorting belts, shall be of
7 such dimensions and design that there are no physical
8 impediments to efficient work in either a sitting or
9 a standing position, and individually adjustable
10 footrests shall be provided. New installations are
11 to be approved by the commissioner."

12 That was 92 years ago. And that Wage Order was followed
13 up by one in 1933 that used similar language. And then by 1947
14 it got to the simplicity we have today. It's actually even
15 simpler.

16 In the 1947 Wage Order it says:

17 "Suitable seats shall be provided for all female
18 employees."

19 Now, in some ways we don't get to the issue here of
20 whether Kmart provided suitable seats because they provided no
21 seats. And I think definitionally if you don't provide any
22 seat, you can't have provided a suitable seat.

23 And I don't think we get to it because in a PAGA, the
24 statute here, a penalty statute. PAGA has no injunctive
25 provisions. You know, we can't get an injunction saying that

1 Kmart shall provide suitable seats in the future. The train
2 has left the station. PAGA looks back and said: Did you
3 provide suitable seats? If not, you get penalized.

4 The plaintiff, if you look at Section 14, has no burden to
5 provide a suitable seat. Because Section 14 says:

6 "All employees shall be provided with a suitable
7 seat."

8 Well, I mean, it's not the employee comes in and brings in
9 a suitable seat and modifies his or her work station.
10 Obviously, it's the employer's burden.

11 So Lisa Garvey had no burden here to design or build or
12 bring into Kmart a suitable seat or work station.

13 And Dr. Johnson, Dr. Johnson doesn't have any, you know,
14 burden to inform Kmart of what would be a suitable seat.

15 Dr. Johnson is going to testify that in his line of
16 work -- and he does consulting, you know, with big companies
17 about work stations and seats. If he gets hired, he goes out.
18 He looks at the job. He looks at how it's performed. He talks
19 to management and it's sort of an interactive process, and he
20 comes up with a design for a seated work station. It's not
21 rocket science by the way, I don't think.

22 You know, so if Kmart wants to know what a suitable seat
23 is, they should ask their witness, their expert, Dr. Fernandez
24 because Dr. Fernandez will testify, as he has testified in
25 deposition, that given a budget -- and he couldn't estimate

1 what it might be, but just an unlimited budget, could he design
2 a sit/stand work station for Kmart? Yes.

3 And, you know, if the question is: Well, has it ever been
4 done? Dr. Johnson will testify: Yeah, it's been done for
5 about 30 years over in Europe.

6 Could we take a look at Exhibit 1?

7 I don't know how I'm doing on time.

8 **THE COURT:** You have about seven more minutes.

9 **MR. McINERNEY:** Okay. Good. Because I'll move it
10 right along.

11 (Document displayed.)

12 **MR. McINERNEY:** I briefly want to familiarize the
13 Court. This is Exhibit 1, and this is just a floor plan of the
14 Tulare store. This is the front door, your Honor,
15 (indicating).

16 **THE COURT:** It's not coming through on my machine --
17 oh, it is coming through but you've got the wrong color. It's
18 white. You have to put in red or green or something so it will
19 stand out.

20 **MR. McINERNEY:** This is why your order said I should
21 speak with your clerk in advance and find out how to operate
22 it. Well --

23 **THE COURT:** I see what you're pointing at. So while
24 it's being adjusted, continue on.

25 **MR. McINERNEY:** Yes, thank you.

1 (Brief pause.)

2 **MR. McINERNEY:** I think I'll just describe it. Thank
3 you.

4 So anyway, the front door is up there on the right sort of
5 protruding out.

6 Would you slide that down a little?

7 As you enter this door, up in the upper right-hand corner,
8 that's the service area and they do refunds and stuff like
9 that. They've got a register there.

10 And then to the left of that is Nathan's restaurant. It's
11 a little snack bar basically. They have got a register in
12 there.

13 Then all this other stuff, dark colored stuff is apparel
14 and clothing.

15 And then before you get down -- well, let me drop down to
16 the middle right. Those are the registers.

17 **THE COURT:** Point your pencil at them to make sure I
18 see.

19 **MR. McINERNEY:** (Indicating).

20 **THE COURT:** That's what I thought. That's, what? It
21 looks like six or so registers.

22 **MR. McINERNEY:** Yes. I think there is actually seven.
23 There is one on top that looks a little shorter. It doesn't
24 have all the candy racks out front as you approach it.

25 And then you have apparel right across from that. And

1 you'll hear our witnesses say that if things got slow, they
2 might be sent out to go straighten apparel. Apparently,
3 people, customers come in and they are looking at different
4 things out there on tables and stuff and they make a mess. So
5 the cashiers are from time to time tasked with walking over
6 there and trying to straighten that out.

7 And then -- well, below that is a jewelry section. They
8 have their own register. There's electronics. In the back
9 there is lay-away.

10 Can we look at Exhibit 7?

11 (Photograph displayed.)

12 This picture is sort of a broad view of a checkout stand.
13 The photographer was actually pretty lousy, and I haven't
14 gotten any better.

15 But that shows you register number one. The Court will
16 observe, they are really tight. Really tiny. And that's why a
17 stool won't fit.

18 But as the Court may also learn from Dr. Johnson, once you
19 make knee room, the very tightness works to the benefit of the
20 cashier because stuff gets into reach readily.

21 Okay. Let's take a look at Exhibit 9.

22 (Photograph displayed.)

23 This is a -- just a -- it's a photograph of the register
24 and it shows the screen where the purchase shows up for the
25 customer to look at and the cashier.

1 And if you look at the upper left, that's a coupon
2 dispenser. Dr. Johnson will testify that's one of the things
3 that you would want to lower or move.

4 Dr. Johnson, incidentally, will testify that this
5 configuration of a Kmart checkout counter, even for a standing
6 cashier, is a train wreck. It's not ergonomically sound at
7 all, even if you're using a standing cashier. You really
8 should modify it.

9 Let's move on rapidly to --

10 **THE COURT:** You've got one more minute.

11 **MR. McINERNEY:** Thank you. Perfect.

12 This is a good shot. This is Exhibit 8, your Honor. This
13 is looking at the checkout stand.

14 (Photograph displayed.)

15 You see how tight it is? And, like I said, right now you
16 put a stool in there, you wouldn't be able to do your job. It
17 would be right in your way.

18 But if we take a look at the next one, Exhibit 10...

19 (Photograph displayed.)

20 ...this is the underneath portion of the existing counter.
21 And you see you've got two plastic bins in there, but with some
22 modification, you know, with a saw and about five minutes, you
23 create knee room in there.

24 Is that the perfect work station? No. But you know we
25 haven't been hired by Kmart to provide or design the perfect

1 work station. We're just making a point, they could have done
2 it and they should have done it.

3 And then, finally, my last remark is, you know, there is
4 no question here what Kmart's policy was. I mean, that's been
5 well documented. And the testimony by Kmart is that despite a
6 policy to give seats to any associate who asks for one, their
7 testimony is that at Tulare no seat was ever provided and no
8 seating was ever requested.

9 The inference that, of course, we'll eventually ask the
10 Court to draw is if they had a policy to provide a seat to
11 anyone who asks for it, that meant the essential functions, in
12 their view, could have been done while seated.

13 Thank you very much, your Honor.

14 **THE COURT:** Thank you, Mr. McInerney.

15 All right. Let's go to the defense opening statement.
16 You also have 15 minutes.

17 **MR. ADKINS:** Thank you, your Honor.

18 **OPENING STATEMENT**

19 **MR. ADKINS:** Thank you, your Honor.

20 Wage Order 14, which Mr. McInerney was just mentioning, in
21 one form or another has been in place since the 1920's. And in
22 all the time since then retailers have been servicing their
23 customers with cashiers who have been standing. No Court, no
24 agency, no regulator during that time has ever taken or adopted
25 the position that the plaintiffs take in this case.

1 As your Honor knows, Section 14 requires that an employer
2 provide a seat to an employee only when the nature of the work
3 reasonably permits the use of a seat. And as you'll see in
4 this trial, your Honor, the evidence will show that the nature
5 of the work as a cashier at the Kmart store in Tulare does not
6 reasonably permit the use of a seat.

7 The cashier is required in the business judgment and
8 policy and model of Kmart to have them work efficiently and
9 provide customer service. Part of those functions require
10 bagging of the merchandise for the customers. It requires
11 handing the merchandise to the customer or placing it into the
12 shopping cart; helping the customer work the point of sale,
13 where you slide your credit card, and they can even take a
14 survey on whether the customer service is to their
15 satisfaction. It includes helping the customer out of the
16 store, if needed. And at all times the cashiers are to show an
17 ever ready alert image eye-to-eye with their customers. And,
18 your Honor, these tasks include lot of physical movements. It
19 includes lifting items.

20 Part of the job description that Mr. McInerney put up on
21 the Elmo here talks about the fact that the cashiers are
22 required to be able to lift more than 20 pounds. You'll hear
23 in this trial, your Honor, everyone will agree, I submit to
24 you, that you can't do that while seated. There is walking,
25 bending, lifting, stretching, twisting repeatedly and

1 continuously, and you can't to that while sitting.

2 And you will hear from the expert, Dr. Fernandez, that if
3 you were to do that as a cashier, it would not be ergonomically
4 sound to do so.

5 And, your Honor, the check stands at the Tulare store are
6 part of the business model, part of the nature of the work.
7 They are designed to be fast and efficient and to convey that
8 customer service. The check stands do not allow enough room to
9 allow a seat safely and efficiently. The plaintiffs concede
10 this central fact. You can't put a seat in there.

11 And Kmart is not alone, your Honor, in terms of having
12 their cashiers stand. Virtually all retailers, major U.S.
13 retailers, have standing cashiers and sales associates for the
14 same reason: The physical demands of the job, the space
15 limitations of the check stand, and the need for customer
16 service, your Honor. That's been true for decades.

17 I would like to speak about the store at issue, the Kmart
18 store at Tulare and its business model. There is an image of
19 it, your Honor.

20 (Photograph displayed.)

21 That's the Kmart store in Tulare, in part of the Central
22 Valley of California.

23 You'll hear that Kmart sells a wide array of merchandise,
24 not surprisingly. Some small and light. Some heavy and bulky.
25 You'll have some kitchenware items, such as this. You will

1 have flat screen TVs, clothing items, furniture, much more.
2 And the business model is to offer this wide array of
3 merchandise at discount prices.

4 And so with that business model --

5 **THE COURT:** Are you saying that big sofa you just put
6 up there, that would be shoved across the -- those items there,
7 those big chairs would be shoved across the checkout counter as
8 opposed to being picked up at the back dock?

9 **MR. ADKINS:** No, your Honor. In fact, as you'll hear
10 in trial, the cashier is to come out and take a tag off of
11 larger items to bring back and to scan in the checkout aisle.

12 And for some of the mid-sized items, like the flat screen
13 TV, your Honor, that can actually can go down the aisle. There
14 is a gun scanner that they take out from under the cashier
15 stand and they walk out into the aisle to scan that in the
16 shopping cart.

17 **THE COURT:** But they don't manhandle it across the top
18 of the -- that's what you were seeming to suggest: These big
19 heavy items have to be picked up by the person.

20 **MR. ADKINS:** No. Certainly, no sofa is going across
21 the scanning counter, your Honor. And the suggestion is they
22 have to move in order to be able to scan those items. They
23 can't stay seated.

24 **THE COURT:** What do you say to this? The plaintiff's
25 point seems to be if you built these stalls big enough to begin

1 with, there could be a stool there. For the smaller items they
2 could handle it with sitting on the stool, but the larger
3 numbers they would have to stand up and they could just stand
4 up. If there was enough room, they could stand up.

5 So what do you say to that point?

6 **MR. ADKINS:** Your Honor, there's several answers to
7 that point, and I think our ergonomics expert will address many
8 of them. In addition to those items, it would be a constant
9 stand/sit situation.

10 It's the fact that it's the business judgment of Kmart to
11 have a cashier stand that allows the efficient and quick
12 movement through that area.

13 Also, that it requires bagging. So you have to go out to
14 the bagging. When you have those larger items, they'd have to
15 get up and to scan those items.

16 They also have a lot of job responsibilities away from the
17 cashier stand. As I was going to mention, your Honor, there's
18 several types of activities that the cashiers are supposed to
19 do.

20 For example, when it comes to customer service, they are
21 the face of the store, your Honor. They greet the customers
22 when the customers come in the store. They make sure the
23 checkout process is efficient and friendly. Oftentimes they
24 are the only point of contact between the customer and the
25 store. In reality, they are the face of Kmart. They usually

1 have -- and they are able to sit. They usually work shifts of
2 at or under four or four-and-a-half hours. When they are on
3 break, they are able to go to the break room and have a seat or
4 sit at the restaurant towards the front of the store.

5 But when they are not on break, your Honor, the evidence
6 in this trial will show that they have a lot of important
7 responsibilities that require constant movement.

8 If we can put up the job description that Mr. McInerney
9 was describing.

10 (Document displayed.)

11 These are exhibits in the trial, your Honor, and these are
12 the official job descriptions that are approved and placed on
13 the internet. They describe job requirements that include
14 duties at the register, away from the register.

15 Away from the register, for example, includes
16 straightening and restocking the merchandise, emptying the
17 garbage bins, replenishing materials, going into the aisle to
18 invite customers in or if there is a longer line over at the
19 next aisle, to make sure they come through swiftly. They go to
20 the service desk. Obviously, none of those of could be done
21 while seated.

22 But focusing on the cashier stand. And that's really the
23 focus of the plaintiff's argument you were referencing.

24 Mr. McInerney referred to cashiers who'll say that they could
25 do their job while seated, which he has conceded none of them

1 ever have done it. They have -- they couldn't use seats in the
2 current configuration.

3 But to answer your Honor's question. Beyond the documents
4 and the witnesses in this case, I think it's -- what's
5 essential to understand this case with common sense and
6 practicality is to actually just see the process in motion.

7 What is this process we're talking about in terms of the
8 checkout stand at the Kmart store? And to look at the
9 continuous movement that I was just describing, all the
10 different physical movements that our ergonomics expert will
11 describe.

12 If you can put up one of the videos that you'll see in
13 this trial, your Honor. There are many of these videos. If we
14 can go ahead and play it.

15 (Videotaped played.)

16 This is, in fact, a cashier at the Tulare Kmart. And
17 there is the checkout counter and the scanning of items. She's
18 facing a scanner right there. She's pulling out bags. There
19 is a cash register to her right. And as you can see, the
20 customer is coming down the aisle.

21 Now, for those seven aisles, your Honor, there's shopping
22 carts coming down each side typically. You can see a flatbed
23 scanner in front of her and the bagging table to her left.

24 Now, as you see these videos, your Honor, and the
25 movements required in the checkout process at Kmart -- and this

1 is why we were talking about some of those items that are sold
2 there -- you'll see that what is required of the cashier is to,
3 first of all, again customer service, to meet the customer
4 eye-to-eye and to welcome them. At times to walk out into the
5 aisle and invite them in. To reach and then pull sometimes the
6 merchandise along that counter to the scanner. You can scan
7 the merchandise on that flatbed scanner or, as I said, there is
8 a little gun they can take out to do the scanning for other
9 larger items that requires movement through that little
10 pass-through right there.

11 They are also instructed to do things for loss prevention,
12 your Honor. If there is a backpack, to unzip the backpack and
13 to look into it to make sure there's no items that have been
14 placed in there either inadvertently or otherwise. They are
15 supposed to, for the same reasons, look into the shopping cart
16 to make sure there is no items in there that have not been
17 processed through the transaction. They are trained on this.

18 They are also trained on sales. There are add-on sales
19 that they are supposed to engage in. Certain warranties and
20 use of certain cards for which -- for some of which they
21 receive a financial incentive or commission. There is a pin
22 pad that's located just in front of the checkout scanner, which
23 they are to assist the customer with in terms of the sliding of
24 the card. As you may have experienced, some people have
25 difficulty with that or it's not going through clearly. It's a

1 common occurrence to reach and assist with that. There is a
2 survey that pops up for customers on that pin pad to give a
3 response as to how they felt their customer service experience
4 went.

5 As they scan these items, they then need to go back to the
6 cash register, of course, to do entries. They have to reach up
7 and grab the receipts and coupons that print out. Go back and
8 hand that across to the customer. And then repeatedly going
9 back and forth to the bagging area.

10 And here on the video you will see one of many instances
11 where supplies ran low even in the middle of a transaction,
12 where you have to go somewhere else to grab it and come back,
13 or get change, or call a price check, any number of things
14 required every day, while conducting the essential function at
15 the front-end cash register in Tulare.

16 And, your Honor, when there is down time, you'll hear from
17 numerous witnesses that you're not to stand around. There's
18 plenty of other things to be done around the store, to help
19 keep it running.

20 Your Honor, the plaintiff's position is wrong for a number
21 of reasons, including the fact that the job functions just
22 don't permit a seat, the real job functions that you can see.

23 And you're going to hear from people that have been at
24 Kmart for decades, as well as people in the front lines in the
25 Tulare store, that the practical reality, the common sense

1 reality of how this works in the store doesn't permit a seat.

2 I believe, you know, your Honor has heard about the
3 directive by Ms. Grabau that has been discussed, and that she
4 had sent it out to store managers, that they should provide
5 seats to cashiers upon request.

6 Here's what the evidence, we believe, will show on that
7 directive your Honor, that she was reacting to what she
8 understood was a series of seat cases being brought against
9 California retailers, and she thought her actions would help
10 Kmart, perhaps, forestall being sued; that she did not vet with
11 the Kmart operations executives at the same; didn't go through
12 the same process that, for example, the job descriptions or
13 other policies that are posted on the intranet and are the
14 official policies of the store. Didn't go through that
15 process.

16 And when she told the store managers about her directive,
17 they openly contested it, believing it was inconsistent with
18 the business model. And some of them even voiced that it might
19 lead to cashiers' injuries.

20 Again, your Honor, plaintiffs concede this point. You
21 cannot use a seat under the current configuration in the
22 stores.

23 Now, plaintiff contends that Kmart should be required to
24 rebuild its checkstands to fit a seat. Your Honor, first,
25 that's not what's required by Section 14.

1 Mr. McInerney cited some language about reconfiguration.
2 You know, the original version of that section did include a
3 requirement of reconfiguration, but that was dropped 70 years
4 ago, you know.

5 When laws wish to put in place reconfiguration
6 requirements like in the Americans with Disabilities Act, they
7 do. Section 14 does not.

8 Now, plaintiffs claim that Kmart should rebuild three
9 checkstands based on the opinion of an ergonomics expert,
10 Dr. Johnson. Not an engineering or customer service expert.
11 And you will hear that no retailer has ever adopted his
12 theories, and he didn't give any assurance that his theory will
13 actually work.

14 In fact, your Honor we expect the evidence will show that
15 in order to rebuild the Tulare checkstands alone would cost
16 more than \$140,000, projecting statewide into the millions and
17 millions of dollars.

18 And Kmart will call its expert, Dr. Jeffrey Fernandez.
19 He's a recognized expert in ergonomics and in mechanical
20 engineering.

21 He viewed these actual videos of cashiers doing their job
22 in the Tulare store. He'll explain that the job duties of the
23 cashier require physical movements that can't be performed in
24 an ergonomically-safe way while seated. He will say that
25 trying to do so could increase the risk to health and safety.

1 Now, needless to say that Tulare cashiers don't all come
2 in the same size and shape. And many of them are -- have
3 different age, gender, height, weight, physical
4 characteristics. They range from 4-foot-11 to 5-foot-11, and
5 up to 250 pounds.

6 And because of these differences, Dr. Johnson's
7 hypothetical configuration would not allow all the cashiers to
8 perform their jobs at the checkstand while seated, or to do it
9 in ergonomically sound fashion.

10 This sit-and-stand concept that Mr. McInerney raised won't
11 work. The stool is in the way. There's loss of productive
12 time.

13 Kmart's business model talks about customer service that
14 can't be performed while seated.

15 And the doctor will say that things that can be done
16 seated must be done standing. He will claim you can sit
17 ergonomically to perform some of these functions, but the
18 evidence will show that's not correct.

19 And we've talked about customer service, your Honor, but
20 it's important -- it's a very subtle but important part of this
21 case. Customer service is the lifeblood of Kmart in a very
22 competitive marketplace.

23 Kmart does not operate in a vacuum. They have
24 competitors: Target, Wal-Mart. In fact, in Tulare, right
25 across the street from the Kmart store, is a Wal-Mart. And

1 just a few blocks down there is a Target. All of their
2 cashiers stand.

3 And if the expectations of the customers at Kmart are not
4 being met, they can shop elsewhere. They can go across the
5 street, to Wal-Mart.

6 And you will hear in this trial interest Dr. Valerie
7 Zeithaml. She's an expert in customer service and in branding
8 and marketing, and she will discuss those things.

9 She'll explain that because of -- Kmart's customers expect
10 fast and efficient shopping; they expect their items to be
11 bagged; they expect to be treated in a friendly and attentive
12 way; that the customer is always right, or so is the adage of
13 sales; that standing allows those functions to take place,
14 allows that fast transaction, allows that important eye
15 contact, and it allows the customer expectations to be met.

16 Standing, your Honor, sends a message. It's a
17 uniformly-understood message of respect. That's why when we're
18 in court addressing a jury, we stand. You have our complete
19 attention and we're very ready.

20 And as Dr. Zeithaml will explain, that difference between
21 active versus passive engagement is the difference between
22 repeat sales or not.

23 And Mr. McInerney also mentioned Europe for a moment, and
24 that there are some European stores, European based, with a
25 European model, in which the cashiers sit while checking out

1 customers.

2 But, European retailers follow an incredibly different
3 business model than American retailers like Kmart. In Europe,
4 the cashiers provide very little or no customer service. They
5 are expected just to ring up the sale.

6 The customer does the work. So the customer brings the
7 items and places it in front of the seated cashier, who scans
8 it. And then the customer takes those items and goes and bags
9 it themselves.

10 And I suppose we could have a debate about whether the
11 American model or the European model is better in terms of
12 sales or customer service, although it's been shown that the
13 customer service model in Europe has some of the lowest ratings
14 among American consumers. But, that's not the relevant
15 question in this trial, your Honor.

16 Section 14 does not require an employer adopt a business
17 model. Kmart's allowed to have the business model that works.
18 As is Target. As is Wal-Mart. And that is what they have
19 done. The question is whether it reasonably permits the use of
20 a seat.

21 So, your Honor, after hearing the evidence in this trial,
22 the videos, and the real common sense, practical issues, you'll
23 have certain stubborn facts at the end of the day.

24 First, that cashiers' job duties, like bagging and lifting
25 items more than 20 pounds, they just require you to stand. You

1 can't sit to do it.

2 You can't use a seat with the current checkstand. Kmart
3 would have to reconfigure it in order to even allow it. And
4 contrary to their business model.

5 And, finally, the customers at Kmart and stores like it
6 expect customer service. They have an expectation that needs
7 to be met. It's incredibly important to the business model.
8 And that needs to be accomplished while standing, not sitting.

9 Your Honor, for all those reasons, we ask the Court to
10 reject the plaintiff's claim after hearing the evidence, and to
11 enter its judgment in favor of Kmart.

12 Thank you.

13 **THE COURT:** All right. Thank you, Mr. Adkins.

14 Let me ask a couple of questions to both sides. This work
15 is put out, I presume, by a labor commissioner. Is that
16 correct?

17 **MR. MCINERNEY:** The industrial wage commission, your
18 Honor, yes.

19 **MR. WOHL:** Actually, it's Industrial Welfare
20 Commission, your Honor. They have promulgated a Division of
21 Labor Standards Enforcement under the DLSE, which is headed by
22 the labor commissioner. Their job is to interpret it and
23 enforce it.

24 **THE COURT:** Have there been any interpretive letters
25 or opinions by any of those people?

1 **MR. WOHL:** Yes, Your Honor.

2 **THE COURT:** What?

3 **MR. WOHL:** That's in evidence. They were asked.

4 **THE COURT:** What do you mean in evidence?

5 **MR. MCINERNEY:** They're marked. Some of them are
6 marked.

7 **THE COURT:** Each side summarize, briefly, what those
8 say.

9 **MR. WOHL:** Yes, Your Honor.

10 So both the DLSE is the IWC were separately asked, with
11 regard to a Macy's sales associate, someone who both waits on
12 customers and goes back to the register to ring up the sale, to
13 bag the merchandise, to give it back to the customer -- very
14 similar with Kmart. And the question was, should they be
15 getting a seat?

16 And both the DLSE and the IWC responded, no, the nature of
17 their work is not such that you would sit down because they
18 have to move to do their customer service job. So they
19 rejected that proposition.

20 Also, I don't think Mr. Adkins mentioned it, but there
21 have been three court decisions on interpretation of Section 14
22 on the merits. Not the procedural stuff that precedes it, but
23 on the merits. In the San Francisco Hilton case, dealing with
24 front desk attendants at a hotel. Bank of America, dealing
25 with bank tellers. And, most recently, CVS Pharmacy, dealing

1 with drugstore cashier clerks. Probably the closest
2 equivalency to the Kmart position.

3 Each and every time those judges have said Section 14 does
4 not require providing a seat because the nature of those
5 employees' work.

6 **THE COURT:** Are those federal cases, state cases?

7 **MR. WOHL:** Those were one state case. San Francisco
8 Superior Court decided the *Hilton* case. And Central District
9 decided the *Bank of America* case. And the Southern District
10 decided the *CVS Pharmacy* case.

11 **THE COURT:** Mr. McInerney, what do you say?

12 **MR. MCINERNEY:** Well, there's actually six letters
13 that went to the DLSE in the late '80s and early '90s. And
14 Mr. Wohl has cited the one involving salespersons. And that's
15 a standing position, so we would say that has no applicability.

16 The others, generally, iterated that the rule is the rule,
17 and there's a reason for the rule. And, you know, you have to
18 apply it within the business, and that, historically, it's been
19 interpreted in such and such a way.

20 With respect to the cases, your Honor, the San Francisco
21 Hilton case involved receptionists at the Hilton Hotel. I
22 think that has been pretty well shot through by two DCA
23 opinions in cases in which we were involved: *Home Depot* and 99
24 *Cents*. Happy to provides those cites.

25 With respect to the CVS opinion, which was a federal court

1 opinion, we found that an interesting decision. Judge Anello
2 said that, this is a wage order which applies to cashiers, and
3 it's recognized that cashiers can do their job while seated; so
4 I can't believe that the wage order says what it says.

5 That case was cited to your Honor during class
6 certification, and you declined to follow it.

7 And we have a -- the one nice thing about us, for better
8 or for worse, is, we are an equal opportunity plaintiff firm.

9 They talked about the business models of Wal-Mart and
10 Target. Well, truth is, we've sued them, too.

11 Judge D'Avila certified Wal-Mart for us recently. And
12 another judge, in San Diego, ruled in our favor on --

13 **THE COURT:** Well, certification is not the same thing
14 as winning.

15 **MR. MCINERNEY:** No, no.

16 **THE COURT:** So right now I'm trying to figure out what
17 the wage order means, and whether the agencies have given us
18 any help on --

19 **MR. MCINERNEY:** The answer is no. I mean, the only
20 significance that I can say about the -- you know, these
21 letters that -- and we'll produce them.

22 I think they've actually been attached as, you know, one
23 of a hundred exhibits and SJ motions earlier, and even on cert.

24 But the thing that's important about them is that in the
25 '80s and '90s, both the companies and the DLSE were focusing on

1 this wage order. It's not like something that's been, you
2 know, a military secret. 14 has been around, and it's been in
3 the attention of --

4 **THE COURT:** All right. Here's what I would like to
5 get you to do.

6 **MR. MCINERNEY:** Sure.

7 **THE COURT:** Would you give me a stack of all letters.
8 If they are an exhibit, make sure it has the exhibit numbers,
9 but all rulings by the agencies and in any form, and also the
10 decisions that you think are on point.

11 And then the plaintiff should go through and, in pink,
12 highlight the words you want me to read. And the defendant
13 should go through in blue, and you highlight in blue the words
14 you want me to read.

15 I may read it all, but at least I'll know for sure to read
16 the parts that you have highlighted. And you can give me this
17 tomorrow morning when we start, unless you need more time. If
18 you need more time, fine, I'll give you more time.

19 **MR. MCINERNEY:** I'd like until Thursday morning.

20 **THE COURT:** Thursday morning. Does that work for you?

21 **MR. WOHL:** That certainly does, your Honor.

22 **THE COURT:** Just one stack now. I don't want two
23 stacks. I want the highlighting on one document so I can
24 compare.

25 **MR. WOHL:** May I say a couple of things quickly, your

1 Honor, to dispel what my friend, Mr. McInerney's impression, I
2 think, is being left with the Court?

3 There is no Court of Appeal decision on the substantive
4 interpretation of Section 14. The only thing that's happened
5 has been dealing with these procedural issues, such as, can you
6 even sue for penalties under Padre [sic] for this alleged
7 violation, and so forth. So, please, don't be misled by that.

8 The only positions we have are District Court or trial
9 court decisions.

10 **THE COURT:** Here's my last question. Have either of
11 you submitted these questions to the state agencies, to find
12 out what they think should be the answer in the Kmart case?

13 **MR. WOHL:** I'm not aware any employer has done so,
14 your Honor, but with good reason. The usual policy of the
15 labor commissioner is, they will not opine on any matter that's
16 under active litigation.

17 **THE COURT:** What if I were to ask them for an amicus
18 brief? What would they say?

19 **MR. WOHL:** I don't know, your Honor.

20 **THE COURT:** What would they say?

21 **MR. MCINERNEY:** Probably they will say they are too
22 busy and don't have enough money.

23 But, I will point out that there is one way to get a
24 ruling.

25 **THE COURT:** What's what?

1 **MR. MCINERNEY:** Well, it's that Section 17 that I put
2 up there. It's -- and it's in the wage order. And, at any
3 time, Kmart could have gone to the labor commissioner and
4 sought an exemption. So we know they didn't do that.

5 **MR. WOHL:** There's a quick answer to that, your Honor.
6 Section 17 only applies if, first, Section 14 does apply.

7 So, first, you have to find the nature of the work does
8 reasonably permit a seat. If you've met that finding, then the
9 employer can say, In my particular case, it would create too
10 much of a hardship and wouldn't really promote the safety or
11 health of the employees, and the agency can assert an
12 exemption. But we're not there yet, your Honor, because you
13 have to deal with the Section 14 interpretation issue first.

14 **THE COURT:** You lawyers know the personnel. Look back
15 there in the courtroom and see if you see anyone from any state
16 agency here.

17 Is there anyone in the public seating area who is from the
18 state agencies?

19 I guess not.

20 Mr. Wohl, you did not look back. Do you already know
21 every person in the courtroom?

22 **MR. WOHL:** I'm sorry, your Honor. I didn't realize
23 that was directed to me. I do not see anybody from the state
24 agency. I was going to put them on the spot if they were here.
25 If I could make one more comment, your Honor.

1 **THE COURT:** I want you to think about an amicus brief.
2 If it was going to take a long time, forget it. But if I could
3 get it in a reasonable period of time, I might be interested in
4 getting the considered views of the state officials that came
5 up with this wage order in the first place.

6 **MR. WOHL:** Your Honor, I would observe that these
7 cases have been well publicized for over three years, at this
8 point. I am certain if the agency thought this was something
9 that their views would be of value, we would have heard from
10 them. I do not suppose that they want to get involved with
11 pending litigation. That's the key distinction.

12 **THE COURT:** Can it hurt to ask? I don't know.

13 **MR. WOHL:** And then, your Honor, one other point, if
14 you'll indulge me --

15 **THE COURT:** Who would I even ask? What would be the
16 official agency that I would ask?

17 **MR. WOHL:** Well, the head of the DLSE, is the labor
18 commissioner.

19 **THE COURT:** Labor commissioner.

20 **MR. MATTHEW RIGHETTI:** Your Honor, if I may. Matthew
21 Righetti.

22 In the *Save-On* litigation, which we litigated before Judge
23 Chaney in L.A. Superior complex several years ago, who is now
24 Justice Chaney, she had very similar questions about how the
25 DLSE interpreted the exemptions from overtime for executives

1 under the wage order.

2 And what she did is, she ordered the DLSE to provide a
3 person most knowledgeable to come in and testify at a
4 deposition about what the agency's historic position has been
5 in enforcing and interpreting that provision of the wage order.
6 Which, the DLSE sought to quash it.

7 She denied that motion, and they came in and testified and
8 had no problem testifying about how they handled that wage
9 order. So that's one way it can go.

10 **THE COURT:** Well, that's an imaginative approach, but
11 I'm thinking more mundanely about just a plain ole amicus
12 brief.

13 **MR. WOHL:** If I could be heard on this. Just as a
14 misunderstanding, as I said in my outside remarks, they have
15 spoken to the interpretation of Section 14, the retail
16 environment, twice.

17 And what's very interesting is, you just heard from
18 Mr. McInerney -- and, frankly, their thinking has evolved as
19 they have pursued these cases.

20 Initially, they argued simply for seats, and that was it.
21 Now we hear, well, really what Johnson means is sit/stand.
22 They should sit for part of the time and stand for part of the
23 time.

24 That, your Honor, was precisely the fact pattern presented
25 in the Macy's case, where they asked for the opinion because,

1 after all, the salesmen may need to stand on the sales floor,
2 but, arguably, when he goes back to ring up the sale,
3 consistent with their view, he could sit down and ring up that
4 sale.

5 And the agency said that would be ridiculous. The nature
6 of the work is a customer service on your feet, serving that
7 customer. So, your Honor, our view is that DLSE has actually
8 already spoken to this issue. They have already --

9 **THE COURT:** Let me read your -- you all get this
10 packet put together for me and let me read it before I decide
11 whether to ask for an amicus brief.

12 So give me your packet by Thursday morning, 7:30 a.m.,
13 color coded as I have indicated. And it should also include
14 those other District Court decisions and the like. Court of
15 Appeals.

16 Whatever you want to put in there, that you think bears on
17 the issues of law, I'd like to see what the appropriate
18 agencies and other judges have said on that subject.

19 Now, did you give me -- did you also give me trial briefs,
20 both sides?

21 **MR. WOHL:** I believe trial briefs were submitted, your
22 Honor.

23 **MR. MCINERNEY:** I referred to my boring trial brief
24 earlier.

25 **THE COURT:** Well, if it's boring, I'm not going to

1 read yours, Mr. McInerney.

2 (Laughter)

3 **MR. MCINERNEY:** Yeah.

4 **THE COURT:** If the other one is not boring, I will
5 read it. Boring or not, I will read them both.

6 Okay. We'll take a 15-minute break. Please have the
7 first witness ready to go when we come back.

8 **MR. WOHL:** Yes, Your Honor.

9 **MR. MCINERNEY:** Yes, Your Honor.

10 (Recess taken from 9:11 to 9:34 a.m.)

11 **THE COURT:** Please, be seated. Let's go back to work.

12 Before we get to our first witness, I want to hand out
13 something. Here is a -- the order that I used in the *Oracle*
14 *vs. Google* case, on proposed findings of fact. I will
15 eventually adjust it for your case.

16 Dawn, if you would hand this out. I only have one copy.
17 You will have to share or make a copy.

18 If you would give me your proposed changes sometime
19 tomorrow on how you would like to proceed on these things, then
20 I'm happy to consider any adjustments to it that you have.

21 I do want to say one thing about proposed findings. One
22 gimmick that a lot of lawyers like to do is evade answering --
23 admitting or denying. In other words, what -- the way I have
24 this laid out is, one side says the light was green. The other
25 side then has to either admit it or deny it. And you'll see

1 how that works.

2 What you cannot do is evade. If you evade, you will be in
3 trouble, because I can see right through it. You will see that
4 I have it set up so that you cannot evade.

5 Now, if you're dumb enough to put out a thing like the
6 light was green and the driver was as reckless as anybody on
7 the face of the earth, then, yes, you can deny that even though
8 the light was green, because it's a dumb point to begin with.
9 In other words, nobody in their right mind would frame the
10 point that way.

11 But if it's as simple as the light was green, you've got
12 to say yes or no. You can't say, oh, I don't know. We don't
13 know.

14 This is based upon -- you'll see how -- I want to stress
15 this. This system works very well, and has worked very well
16 for me in almost 14 years. It works well because I come down
17 hard on anyone who evades. If you want to be Mr. or Mrs.
18 Evasion, be my guest. But you will regret it when the findings
19 of fact come out.

20 All right. So you two share on that and see. If you want
21 me to change the wording, then I'm happy to consider a way to
22 change the wording.

23 All right. So that's that item. And then I have this
24 question for you before we get to the first witness.

25 This is a class action for the Tulare store only. So I

1 have this question for you. Let's -- I'm going to ask it both
2 ways.

3 Let's say that the defendant wins. Is this going to be --
4 even though not technically res judicata against all the other
5 stores, is this going to be the end of the line, or do we then
6 go to store number two, store number three? And can the
7 plaintiff keep improving upon -- plaintiffs keep improving upon
8 the story as we go forward?

9 Or, let's say plaintiff wins. Is this going to be the end
10 of the story Kmart-wide?

11 Now, I know what you're both thinking. Neither of you
12 want to admit or deny that because I know how you think.

13 But I'm going to ask -- here's the thing. I want you to
14 answer that question right now. Because if you do wind up
15 winning, and you try to take a different position later, you're
16 not going to be allowed to.

17 So I want to hear right now what your position is. Is
18 this going to be -- is this going to decide this story once and
19 for all, for all stores, or is this going to be a one-off
20 thing?

21 I'm okay either way. It's just if you wind up losing,
22 you're not going to be allowed to adjust.

23 Let's hear what you have to say on that subject.

24 **MR. MATTHEW RIGHETTI:** Thank you, Your Honor.

25 **THE COURT:** Okay. Please, go ahead.

1 **MR. MATTHEW RIGHETTI:** I'll let Mr. Wohl go first.

2 **THE COURT:** No, Mr. Righetti, you get to go first.

3 (Laughter)

4 **THE COURT:** You're the plaintiff.

5 **MR. MATTHEW RIGHETTI:** Based upon the -- I think how
6 the issues are framed for the Court, I think it's going to be
7 all or nothing.

8 **THE COURT:** So this is all stores or nothing?

9 **MR. MATTHEW RIGHETTI:** For --

10 **THE COURT:** All stores. It's not nothing. It's going
11 to be all stores.

12 **MR. MATTHEW RIGHETTI:** Right. I think, for instance,
13 if the Court finds that there's business judgment that comes to
14 bear on this, and that the Court should defer to Kmart's
15 business judgment, then that's going to apply to all of the
16 stores.

17 **THE COURT:** I don't know what the -- maybe I find -- I
18 don't know. Maybe I find something -- something different.
19 But your view is it's all or nothing?

20 **MR. MATTHEW RIGHETTI:** Yes, Your Honor.

21 **THE COURT:** All right. Let's hear from the defendant.

22 **MR. WOHL:** Our view, your Honor, is that since you've
23 only certified the class of Tulare employees, it would only be
24 binding as to that class or to Kmart as to that class.

25 Any effect on future proceedings would just depend on what

1 the Court does.

2 **THE COURT:** So that means that if you win, we are
3 going to store number two, and you can't argue we've already
4 decided the issues, unless there's something about the way in
5 which the Court decides the issues that is compelling in all
6 cases.

7 **MR. WOHL:** Yes, Your Honor. I think that could be a
8 possibility. Thank you.

9 **THE COURT:** Okay. You two have now stated your views
10 on that. We will now go forward to start hearing the evidence.

11 At this time, plaintiff may call its first witness.
12 Please, go ahead, Mr. Righetti.

13 **MR. MATTHEW RIGHETTI:** Plaintiff calls Dr. Steven
14 Johnson, your Honor.

15 **THE COURT:** All right. Are you that man?

16 **THE WITNESS:** I am, sir.

17 **THE COURT:** Please, stand up and raise your right
18 hand, and the clerk will swear you in.

19 **STEVEN JOHNSON,**
20 called as a witness for the Plaintiff herein, having been first
21 duly sworn, was examined and testified as follows:

22 **THE WITNESS:** I do.

23 **THE COURT:** Okay. Thank you.

24 **THE CLERK:** Okay.

25 **THE COURT:** Okay. Excellent. Have a seat.

1 What you need to do, so everyone can hear, be this close
2 to the microphone. Say your name so we make sure it's coming
3 through okay.

4 **THE WITNESS:** Steven Johnson.

5 **THE COURT:** Can everyone hear okay over there?

6 Okay. Great. You have materials in front of you. I
7 don't care if you do or not. But, the lawyers ought to know
8 that the witness has got some kind of notes in front of him.
9 If you object, we'll have proceedings on that. But I don't
10 know.

11 **MR. WOHL:** I appreciate you drawing our attention to
12 it. I would like to know what notes Dr. Johnson has in front
13 of him.

14 **THE COURT:** What do you have in front of you?

15 **THE WITNESS:** Exhibit 28, Exhibit 29, and my CV.

16 **THE COURT:** Close everything up until you get
17 permission to look at it.

18 **MR. WOHL:** As long as those are exhibits in evidence,
19 no objections.

20 **THE COURT:** Let's wait and see.

21 **MR. MATTHEW RIGHETTI:** So stipulated.

22 **THE COURT:** What?

23 **MR. MATTHEW RIGHETTI:** We'll stipulate.

24 **THE COURT:** I don't think people should be testifying
25 with crib notes.

1 **MR. MATTHEW RIGHETTI:** It's his report.

2 **THE COURT:** Unless I give him permission to. I don't
3 care whether it's in evidence or not. He's going from his
4 memory under oath. If he needs to refresh his memory as to his
5 CV, okay, he can ask to do that.

6 But, we're going to do this the technically -- not
7 technically. I don't like that word. We're going to do this
8 the proper way. If we get to the point where he can't remember
9 where he went to college, then you may ask him to look at his
10 resume.

11 Thank you.

12 **MR. MATTHEW RIGHETTI:** Closed-book exam.

13 **THE COURT:** Right.

14 **MR. MATTHEW RIGHETTI:** For starters.

15 **THE COURT:** This is the real thing, Mr. Righetti.

16 **MR. MATTHEW RIGHETTI:** Okay.

17 **THE COURT:** This is not something else. This is it.

18 Okay. I'm all ears. Go right ahead.

19 **MR. MATTHEW RIGHETTI:** Have you been sworn?

20 **THE COURT:** He's been sworn.

21 **MR. MATTHEW RIGHETTI:** Thank you.

22 **DIRECT EXAMINATION**

23 **BY MR. MATTHEW RIGHETTI:**

24 **Q.** Dr. Johnson, where do you reside?

25 **A.** In Fayetteville, Arkansas. 2432 North Toy Drive.

1 Q. And are you employed?

2 A. Yes, I am.

3 Q. Where are you employed?

4 A. University of Arkansas.

5 Q. What do you do for the University of Arkansas?

6 A. I'm a professor of industrial engineering.

7 Q. And how long have you been employed as a professor of
8 industrial engineering at the University of Arkansas?

9 A. Thirty years.

10 Q. And what do you do as a professor of industrial
11 engineering at the University of Arkansas over those years?

12 A. I teach graduate and undergraduate courses. I do
13 research, and then I do service within the university.

14 Q. Okay. And do you have any other employment over that
15 period of time other than your University of Arkansas work?

16 A. I have a consulting company, Ergonomic Analysis
17 Incorporated, that I'm president of, and that was since 1980.
18 I spent a semester on sabbatical in England at the University
19 of Nottingham, and then I taught one semester at Pohang
20 University of Science and Technology in Pohang, Korea, but
21 other than that, no.

22 Q. All right. Does the -- being a professor of industrial
23 engineering have anything to do with being an ergonomist?

24 A. The field I teach is ergonomics. One of the areas that I
25 teach is ergonomics.

1 Q. Can you explain what the field of ergonomics is?

2 A. Ergonomics is designing the -- matching the physical,
3 physiological and psychological requirements of the job with
4 the physical, physiological and psychological characteristics
5 of the person is probably the easiest description.

6 Q. And how long have you one doing that kind of work?

7 A. Forty years.

8 Q. And what educational background do you have that qualifies
9 you, in your view, to do that kind of work?

10 A. I received a bachelor's degree in psychology at the
11 University of South Dakota. After my bachelor' degree, I went
12 to the University of Illinois and joined the aviation research
13 laboratory -- which was an interdisciplinary laboratory of
14 electrical engineers and mechanical engineers and
15 aero-engineers and psychologists -- and did the
16 interdisciplinary work.

17 I got a master's degree in engineering psychology at the
18 University of Illinois, and then went to Buffalo, New York, to
19 work. Finished my Ph.D. in Buffalo at the State University of
20 New York in Buffalo, in human factors, which is sometimes in
21 psychology and sometimes in industrial engineering.

22 At the State University of New York at Buffalo, it was in
23 engineering, so I finished my Ph.D. in ergonomics in industrial
24 engineering at State University of New York at Buffalo.

25 Q. When you do work for ergonomic analysis, which is apart

1 from your University of Arkansas work, can you explain for us
2 what type of work you do?

3 **A.** It's in both the ergonomic -- sometimes ergonomics is
4 referred to as human factors. "Human factors" is the
5 terminology that's used in the United States a lot of times.

6 And so I'll do consulting on workplace design. I do
7 consulting on quality control as well. Methods in work
8 measurement, designing processes, lean manufacturing, lean
9 processes type of work, as well.

10 But the primary work would be -- in terms of ergonomics
11 would be looking at workplace design and tasks, the tools and
12 equipment that they use.

13 **Q.** Who hires Economic Analysis, Inc., for you to do those
14 types of analyses?

15 **A.** I work for the companies themselves, the individual plants
16 or the corporations.

17 **Q.** Can you give some examples of the companies that you've
18 worked for in that area?

19 **A.** Yes. I have a list in my resume. May I access that?

20 **THE COURT:** No, unless you've forgotten. Have you
21 forgotten who they are?

22 **THE WITNESS:** No, I --

23 **THE COURT:** All right. Then you have to stick with
24 memory.

25 **THE WITNESS:** It is a list of, I think, approximately

1 60 different companies over this period of time. It has ranged
2 from steel companies, Chaparral Steel; poultry companies,
3 Tyson's and George's and ConAgra.

4 It has included Maybelline. It has -- Mary Kay cosmetic
5 industry. It's been the food processing industry, French's
6 Mustard. A wide variety of industries.

7 **BY MR. MATTHEW RIGHETTI:**

8 **Q.** Okay. Did you also work for General Motors Institute?

9 **A.** Yes. I worked for General Motors Institute after I got my
10 Ph.D., received my Ph.D.

11 **Q.** For how long and what did you do for them?

12 **A.** I was there for five years. General Motors Institute, at
13 that time, which is now Kettering University today, is a -- was
14 a wholly-owned subsidiary University of General Motors. It
15 only had engineering and management.

16 And there I did the same thing only I didn't have graduate
17 students. I was teaching human factors, or ergonomics, quality
18 control, methods in work measurement, design experiments and
19 statistics.

20 **Q.** Did any of that work involve evaluating the workstations
21 of workers?

22 **A.** Yes, yes, I did consulting within the corporation on
23 production operations as well as some limited amount of work on
24 product design. But most of it was on the industrial
25 operations.

1 Q. Have you ever been hired as -- has Ergonomic Analysis,
2 Inc., ever been hired by retailers to evaluate whether the
3 cashier positions at the retail stores can be performed while
4 seated?

5 A. Yes. I work for -- not to determine whether it could be
6 done seated at Aldi, but -- Aldi is a grocery store company
7 that has seated operators, and I did some consulting work for
8 them.

9 THE COURT: What was that name again?

10 THE WITNESS: Aldi, A-l-d-i.

11 THE COURT: Where are they located?

12 THE WITNESS: It's a German grocery store company that
13 has set up in the United States. I think it has about 400
14 stores around the United States, mostly in upper midwest.

15 And, again, because it was a German store, they have
16 the -- Europeans do it that way. They have -- the checkout
17 operation was in a seated posture, and I did some work with
18 them.

19 And then I also did some consulting with Wal-Mart on
20 looking at seated operations on their checkout.

21 THE COURT: Now, Counsel, let's just be clear what
22 we're doing here. You're putting some pictures up. If there's
23 no objection, that's fine.

24 But the witness wasn't testifying to any of this, so I
25 don't know what the point of doing this is. Is this sort of

1 like background pictures for me to -- I don't get it. If he's
2 not going to be testifying about these pictures --

3 **MR. MATTHEW RIGHETTI:** He --

4 **THE COURT:** -- I can't do two tracks. I can't have
5 your slide show going and the witness going. I need one track.
6 If he wants to refers to these pictures, okay, he can do that.

7 **MR. MATTHEW RIGHETTI:** Well, these are all figures
8 from his report.

9 **THE COURT:** Then he needs to refer to them.

10 **MR. MATTHEW RIGHETTI:** I was going to lay a foundation
11 for this.

12 **THE COURT:** Then please do that. You can do that
13 part. But these were sliding by with no testimony.

14 **MR. MATTHEW RIGHETTI:** Right. I understand.

15 **MR. WOHL:** And I appreciate it, your Honor. I didn't
16 even see it was on the screen. I was focused on Dr. Johnson,
17 so thank you for that.

18 **THE COURT:** Go ahead.

19 (Document displayed.)

20 **BY MR. MATTHEW RIGHETTI:**

21 **Q.** All right. What we have is a photo on the screen, which
22 is Figure 1 from -- I'll represent it's Figure 1 from page 7 of
23 the report you provided in this case.

24 Do you recognize that photo?

25 **A.** Yes, I do.

1 Q. And what is that?

2 A. This was the Aldi store back when I was doing work with
3 them, which is in '94 to '96, in that range. This
4 particular -- they were just transitioning to scanners. And
5 this particular workstation was a 10-key operation.

6 In other words, they put the data into the keyboard as
7 they were checking as opposed to a scanning operation. But it
8 was an example of what they were doing in a seated posture.
9 After they scanned the item, they put it in the basket.

10 Q. Is this, you know, the work area that you were evaluating
11 for the work that you did for Aldi?

12 A. No, this is Aldi -- well, I looked at this, but this was
13 not their primary concern. Their primary concern was the
14 scanning workstations as opposed to the 10-key.

15 Q. Okay. Let me show you what's Figure 2 on page 9 of your
16 report and ask you if you can please identify --

17 **THE COURT:** Let me stop for a second.

18 Usually reports don't come into evidence. They're hearsay
19 unless you two have stipulated otherwise, in which case that's
20 fine. Is there such a stipulation?

21 **MR. MATTHEW RIGHETTI:** We haven't discussed it. I'm
22 fine with allowing them into evidence.

23 **THE COURT:** Well, you're showing these, but they're
24 not in evidence.

25 **MR. MATTHEW RIGHETTI:** Not yet, right.

1 **THE COURT:** I'd like for them to be moved one at a
2 time, because if we do it at the end of the witness, I will
3 have forgotten everything about the foundation. So you need to
4 move them one at a time, as soon as you're done with it, and
5 let's see if there's an objection.

6 **MR. MATTHEW RIGHETTI:** Okay.

7 **THE COURT:** So if you -- that's just the way it helps
8 me keep -- rule while it's fresh. Now, maybe there's no
9 objection.

10 What's the exhibit number we have up on the screen now?

11 **MR. MATTHEW RIGHETTI:** It is a portion of Exhibit 28.
12 It is Figure 1 on page 9 of Exhibit 28.

13 **THE COURT:** Any objection?

14 **MR. WOHL:** I'll object, your Honor. It's not
15 relevant.

16 **THE COURT:** All right. That objection is overruled.

17 What is that exhibit number?

18 **MR. MATTHEW RIGHETTI:** I would -- it's Exhibit 28, and
19 I would mark it as 28A.

20 **THE COURT:** All right. 28A is in. It's your burden
21 to get that today, Mr. Righetti. Listen to me now.

22 **MR. MATTHEW RIGHETTI:** I am, yes.

23 **THE COURT:** Today. The tag has got to be correct
24 today. All right. Please attend to that when the session is
25 over, or before that. But we can't let -- if it's not properly

1 marked now, you're in violation of the Court rules already.

2 **MR. MATTHEW RIGHETTI:** I understand.

3 **THE COURT:** So you've got to get that fixed.

4 All right. 28A received.

5 Go ahead.

6 (Trial Exhibit 28A received in evidence.)

7 (Document displayed.)

8 **BY MR. MATTHEW RIGHETTI:**

9 **Q.** The next photo, do you recognize that photo?

10 **A.** Yes, that's the workstation that I looked at for Aldi, and
11 it's a seated workstation where they are scanning now as
12 opposed to using a 10-key, using an input into a keyboard.

13 **THE COURT:** You looked at it in Germany or here?

14 **THE WITNESS:** No, this was in the United States.

15 **THE COURT:** What state was that in?

16 **THE WITNESS:** In Kansas and Arkansas. They had some
17 stores in Kansas and some in Arkansas. They have stores all
18 over, but those are the only two locations that I observed.

19 **THE COURT:** All right. Go ahead. Thank you.

20 **MR. MATTHEW RIGHETTI:** This is Figure 2 of page 9 of
21 Dr. Johnson's report, and we would move that into evidence as
22 well.

23 **THE COURT:** That's what exhibit number?

24 **MR. MATTHEW RIGHETTI:** 28B.

25 **THE COURT:** 28B. Any objection?

1 **MR. WOHL:** Yes, Your Honor. Object on basis of lack
2 of relevancy. And just to make clear, the witness has not said
3 that he did any seat evaluation for Aldi, simply looked at the
4 scanner. There's no issue about scanner configuration in this
5 case, so it's not relevant to the testimony.

6 **THE COURT:** That objection is overruled. 28B
7 received.

8 Please continue.

9 (Trial Exhibit 28B received in evidence.)

10 **BY MR. MATTHEW RIGHETTI:**

11 **Q.** So can you explain for us what you did for Aldi when you
12 consulted with them on their workstations in the United States?

13 **A.** Well, the -- this was in the '90s. And there was a big
14 surge at that point in the United States of problems with
15 cumulative trauma disorder called musculoskeletal disorders.
16 Carpal Tunnel Syndrome was one of the main ones.

17 This was one of the things that caused a lot of
18 organizations to be concerned with ergonomics. They did not
19 have any experience -- negative experience with that, but they
20 wanted to make sure that they handled that from their
21 standpoint.

22 So they asked me to come in and look at their workstation
23 and make any recommendations that I might that would help them,
24 basically, make it a more efficient operation. And so it was
25 looking at the -- the -- the seated operation.

1 It was not to look at whether it would be standing or
2 seated. It was already a seated operation, and that's what
3 they wanted to stay with. But then look at the footrests and
4 the scanner and how they were proceeding.

5 And then I also developed for them a training program on
6 how to use good biomechanics in the process of doing scanning.
7 And they took what I developed and then made it into part of
8 their training program for their cashiers.

9 Q. What type of products are sold at Aldi?

10 A. It's a grocery store.

11 Q. All small items like toothpaste and Dixie cups?

12 A. No, it has --

13 MR. WOHL: Objection, Your Honor, leading.

14 THE COURT: Pretty close to leading. I'll allow it
15 this time, but do not lead your own witness.

16 Go ahead, answer the question.

17 THE WITNESS: It has a range. It's much like a
18 Safeway store or a Kroger's.

19 THE COURT: Those are grocery stores too?

20 THE WITNESS: Yes.

21 THE COURT: Okay.

22 BY MR. MATTHEW RIGHETTI:

23 Q. I'm going to go back to your background now.

24 Are you a member of -- strike that.

25 Have you been a member of any professional societies?

1 A. Yes. The Human Factors Society. The Institute of -- it's
2 now it's called Human Factors and Ergonomics. Traditionally,
3 it's called Human Factors Society. Human Factors and
4 Ergonomics Society. The Institute of Industrial Engineers.
5 The Society for Quality Control. And then I'm also a member of
6 the Transportation Research Board. And, yeah, those are the
7 societies.

8 Q. And have you held any positions of note with any of those
9 societies?

10 A. I was chair -- chairman of the -- chair of the industrial
11 ergonomics group, technical group in the Human Factors Society.
12 I was the director of the ergonomics group of the Institute of
13 Industrial Engineers. Those would be the only ones.

14 Q. Have you received any awards?

15 A. I -- I'm a member of the -- in terms of organizations, I'm
16 on the board -- I was on the board of directors of BCBE.
17 That's the accrediting agency for ergonomics nationally.

18 I got the Jerome H. Eli award from the Human Factors
19 Society for an article. And then last year -- or two years
20 ago, I had an article that was selected as being one of the
21 best articles in the last 30 years in the human factors area.

22 Q. Have you participated in authoring any textbooks or
23 chapters of textbooks?

24 A. Yes. I'm a second author on a textbook, "Occupational
25 Ergonomics," and -- with Stephen Konz. There's also an

1 instructor's manual that goes with that, that's a second
2 document. That's the only textbook I've been a coauthor on.

3 And then I've been an author on a number of chapters in
4 reference books and textbooks.

5 Q. Who is Stephen Konz, K-o-n-z?

6 A. He was -- he's retired now. He was a faculty member at
7 K State, at Kansas State University --

8 Q. What area?

9 A. -- in the industrial engineering department.

10 Q. Does he work in the area of ergonomics?

11 A. Yes, he does.

12 Q. And tell us about how you become involved in writing
13 chapters for other textbooks.

14 A. The authors -- or the editors, I should say. The editors
15 of those textbooks search out people to write on specific
16 topics that are applicable to their textbook.

17 Q. This -- the one textbook, "Work Design Occupational
18 Ergonomics," that you coauthored with Stephan Konz, how is that
19 used? Who uses that?

20 A. It's used -- I don't know, I haven't looked lately. It
21 was used by about 20 different universities in and around the
22 United States, and then used also internationally a bit.
23 But -- in university. They use it for introductory ergonomics
24 courses.

25 Q. For undergrad?

1 A. For undergrad.

2 Q. Okay. And that publication began approximately when?

3 When was the first edition, do you know?

4 A. I got involved in the sixth edition, I believe. It's in
5 the seventh edition now. I got involved in the fifth edition.
6 This is now in the seventh edition. And I don't know exactly
7 when the first edition was published.

8 Q. In addition to being the author -- strike that.

9 In addition to being the coauthor or chapter author of
10 various textbooks, does your ergonomics work involve being the
11 author of any articles, published articles?

12 A. Yes, I published articles. Most of my research is in the
13 form of reports to the sponsors as opposed to refereed journal
14 articles. But I have had some refereed journal articles as
15 well.

16 Q. And over the years, how many articles would you estimate
17 you've published in the area of ergonomics?

18 A. Over 50.

19 Q. And as part of your work as an ergonomist, do you work on
20 funded research projects?

21 A. Yes, I do.

22 Q. Explain that type of work for us, if you would.

23 A. That's work where either I've become interested in
24 something and then found someone to fund the research at the
25 University of Arkansas, on my own time, part of my own time, as

1 well as the graduate students' time.

2 Or, sometimes, organizations develop requests for proposal
3 and send them, and we respond to those in a competitive
4 situation.

5 Or sometimes I've had National Science Foundation grants
6 where you send an unsolicited proposal to the National Science
7 Foundation and they fund it.

8 **Q.** What are some of the organizations that have funded your
9 research from the area of ergonomics?

10 **A.** The Air Force, United States Air Force. Department of
11 Transportation. The U.S. Poultry and Egg Association.
12 Truckload Carriers Association. The majority of my research
13 has been funded by industry groups.

14 **MR. MATTHEW RIGHETTI:** Your Honor, we would move to
15 have Dr. Johnson qualified as an expert in the area of
16 ergonomics. I'm not sure if there is an objection or we can
17 stipulate to that.

18 **THE COURT:** In federal court you don't need to do
19 that. As long as he stays within the scope of his established
20 expertise, the opinions will come in. Obviously, he has
21 expertise in -- I'm not quite sure myself what the field would
22 be, but ergonomics sounds close enough.

23 You have to stay within his scope of expertise and not
24 veer outside that. As long as he stays there, you may -- and
25 stays within the four corners of his report, you will be fine.

1 So it's unnecessary to make that motion. A lot of lawyers
2 do it and I never have understood exactly why. You laid the
3 foundation and showed that he has considerable expertise. That
4 doesn't mean that all of your questions are going to be within
5 that expertise. That's my -- I've learned the hard way I have
6 to say that. Okay?

7 **MR. MATTHEW RIGHETTI:** Thank you.

8 **THE COURT:** So stay within his expertise.

9 **BY MR. MATTHEW RIGHETTI:**

10 **Q.** As part of your ergonomics work, are you licensed?

11 **A.** Yes, I am a registered engineer in Arkansas, professional
12 engineer in Arkansas.

13 **Q.** How is your time split between your work at the University
14 of Arkansas versus your work for private clients at the
15 Ergonomic Analysis, Inc.?

16 **A.** In terms of percentage --

17 **Q.** Sure.

18 **A.** -- time? Twenty percent. Traditionally, I did research
19 during the summer. Over the last couple of years I've done
20 more consulting during the summer. I'm on a nine-month
21 appointment. So it's increased a little bit in the last few
22 years.

23 But in general, about 20 percent of my time is with
24 consulting, and 80 percent of my time is university.

25 **Q.** Do you do a lot of testifying in court?

1 A. No, this is the first time I've ever been in court.

2 Q. When were you -- if you recall, approximately, when were
3 you retained in this case?

4 A. Uhm, I believe it was in February or March. March of this
5 year.

6 Q. And do you recall what the -- explain what it was that you
7 were asked to do as part of your work in this case.

8 A. Well, I was asked to look at -- at Kmart's work checkout
9 stand, the tasks that are performed by the cashier in the -- at
10 the checkout stand at Kmart organization, and to look at
11 whether those tasks -- define those tasks and determine whether
12 those tasks could be performed in a seated posture.

13 Q. And had you ever done that type of evaluation in the past,
14 to determine whether something could be done in a seated versus
15 standing or sit/stand option?

16 A. Yes. Part -- when I did the consulting for Wal-Mart, I
17 was looking at the advantages and disadvantages of different
18 configurations. And then also with CVS, Rite Aid and Target,
19 I've have been involved in those options.

20 Q. That's because CVS, Rite Aid and Target, you were hired to
21 do litigation consulting, correct?

22 MR. WOHL: Objection. Leading, your Honor.

23 THE COURT: That's leading.

24 MR. MATTHEW RIGHETTI: You're right.

25

1 BY MR. MATTHEW RIGHETTI:

2 Q. Tell us, if you would, what the -- I'm trying to separate
3 between you being hired by a company to do an evaluation versus
4 you being hired in a litigation context.

5 So you had mentioned Aldi as a company that hired you to
6 do an evaluation of a cashier position. You recall that?

7 A. Yes.

8 Q. Were you hired by any other corporate clients to do an
9 evaluation of their cashier workstation in the United States?

10 A. I was hired by Wal-Mart to look at the advantages and
11 disadvantages of different postures, including seated posture.

12 Q. For what position?

13 A. For a check -- for checkout operations for cashiers.

14 Q. In what geographic region?

15 A. This would be -- it was in northwest Arkansas.

16 Q. Okay. And can you discuss with us the scope of your work
17 and your findings from the Wal-Mart -- Wal-Mart consultation
18 that you did?

19 A. My understanding is, no, I have a confidentiality
20 agreement about the results of that research.

21 Q. Confidentiality agreement with whom?

22 A. With Wal-Mart.

23 MR. WOHL: Your Honor, may I be heard on this?

24 THE COURT: Yes.

25 MR. WOHL: Mr. -- Dr. Johnson testified freely in a

1 case called *Brown vs. Wal-Mart*, which is yet another seats case
2 prosecuted by the same plaintiff's counsel as here, and there
3 was no declination to answer any questions, there was no
4 protective order entered, there was no confidentiality order.

5 It was a -- as public a deposition as any deposition there
6 could be, so there is no basis for the witness to avoid
7 answering questions about his Wal-Mart work on the basis of
8 confidentiality.

9 **THE COURT:** Is this something that's going to come up
10 on cross?

11 **MR. WOHL:** Yes, it is, your Honor, very much so.

12 **THE COURT:** Well, then we'll get to it on cross.

13 Are you going to get into this yourself?

14 **MR. MATTHEW RIGHETTI:** I would love nothing more than
15 to talk about his Wal-Mart work, but I think that we couldn't
16 do that without notifying Wal-Mart.

17 **THE COURT:** Well, did he, in fact, testify in -- did
18 he testify in some other case freely about this subject matter?

19 **MR. MATTHEW RIGHETTI:** In the Wal-Mart litigation, he
20 testified about the work he did for Wal-Mart. And as I
21 understand it, in all their litigation he has felt confined by
22 the -- by the confidentiality agreement that Wal-Mart had him
23 sign.

24 So the point was that Wal-Mart couldn't prevent him from
25 testifying about his work in Wal-Mart pursuant to a

1 confidentiality agreement, but, you know --

2 **THE COURT:** Has he, in fact, testified?

3 **MR. MATTHEW RIGHETTI:** He has provided -- he testified
4 as a fact witness at deposition under subpoena in the Wal-Mart
5 case. That's what I understand.

6 **MR. WOHL:** And no time during the deposition, your
7 Honor, was there any sealing of the deposition, protective
8 order, confidentiality. Wal-Mart showed up, plaintiff's
9 counsel showed up, they proceeded to examine the witness. It's
10 all public record and we have it.

11 **THE COURT:** Did he testify just on facts or did he
12 testify about opinions?

13 **MR. WOHL:** Well, he testified in terms of -- as a fact
14 witness in terms of what he did for Wal-Mart.

15 **MR. MATTHEW RIGHETTI:** Do you have a -- I assume what
16 you're saying is you have a copy of that deposition transcript.

17 **MR. WOHL:** Yes, I do.

18 **THE COURT:** Well, when we get to -- you have a copy
19 and that was not sealed or anything like that?

20 **MR. WOHL:** That's correct, Your Honor.

21 **THE COURT:** Well, when we get to your
22 cross-examination, we'll decide then how far you can go on
23 that. Plaintiff's counsel says he doesn't want to get into it
24 anyway. But if he did testify -- I'll just tell you
25 tentatively, if he has testified as an open book in some other

1 case, then he's going to be allowed to be examined within -- to
2 that same extent in this case.

3 **MR. MATTHEW RIGHETTI:** Sure. Mr. Wohl makes
4 representation about whether it was sealed, whether it was
5 subjected to the confidentiality.

6 **THE COURT:** Yes, he does.

7 **MR. MATTHEW RIGHETTI:** I wasn't the attorney who took
8 that deposition.

9 **THE COURT:** Well, I'm not going to take Mr. Wohl's
10 word for it. He'll have to bring in a witness to prove, to
11 voir dire something that it was, in fact, open. So maybe he'll
12 put on one of his colleagues. I don't know how he'll do it.

13 But if you two can't agree on that point, then we'll have
14 to have -- it'll come out of your time -- not your time; it'll
15 come out of Mr. Wohl's time -- a sideshow on whether or not it
16 was under seal or not.

17 We've taken up too much time on this. You don't want to
18 get into it, correct?

19 **MR. MATTHEW RIGHETTI:** I said I don't have any problem
20 getting into it. We would --

21 **THE COURT:** Well, then if you want to get into it, go
22 ahead.

23 **MR. MATTHEW RIGHETTI:** But I worry about the --
24 Dr. Johnson has concerns about the confidentiality agreement.

25 **THE COURT:** He refuses to answer, I'll take that into

1 account in evaluating his credibility.

2 I'm telling you if you testified to this as an open book
3 in some other case and there was no privilege there, there's no
4 privilege here.

5 **MR. MATTHEW RIGHETTI:** We don't know whether privilege
6 was asserted.

7 **THE COURT:** Well, he can tell us. He's the witness.
8 He's under oath.

9 **MR. MATTHEW RIGHETTI:** Okay. I don't know if he would
10 know, but --

11 **THE COURT:** Maybe not. Find out.

12 **BY MR. MATTHEW RIGHETTI:**

13 **Q.** At the Wal-Mart deposition, do you know if Wal-Mart
14 asserted your confidentiality agreement as part of those
15 proceedings?

16 **A.** I do not know whether they did or not. They were present
17 at the deposition.

18 **Q.** Do you know whether or not they sealed or sought to seal
19 your deposition transcript?

20 **A.** I do not know if they sought to seal it.

21 **Q.** Under the protective order or confidentiality agreement?

22 **A.** I do not know.

23 **MR. MATTHEW RIGHETTI:** I'm ready to move on from
24 Wal-Mart.

25 **THE COURT:** All right. Please, go ahead.

1 **MR. MATTHEW RIGHETTI:** Thank you.

2 **BY MR. MATTHEW RIGHETTI:**

3 **Q.** So the -- when you were hired to evaluate the Kmart --
4 let's get back to your Kmart work.

5 So you were hired around March of 2012, to do an
6 evaluation of Kmart checker stations in California; is that
7 your understanding?

8 **A.** Yes.

9 **Q.** All right. And had you -- you had done some work
10 evaluating seated cashier positions in the past, right?

11 **A.** Yes.

12 **Q.** Okay. As part of your work in this case, did you evaluate
13 the extent to which the retail industry provides seats to
14 cashiers?

15 **A.** In terms of evaluating it, no. Just my own experience,
16 which was, to my knowledge, that Aldi was, but most of the
17 retail organizations in the United States used standing
18 cashiers.

19 **Q.** How about in other countries? Did you do an evaluation of
20 the extent to which seated versus standing cashiers are used in
21 other countries?

22 **A.** Well, when I lived in England, from that experience I knew
23 that they seat -- they were seated at the cashier station
24 throughout Europe, traveling through Europe. And then I
25 traveled to London about a year ago to look at a number of

1 different companies that use seated cashiers.

2 Q. Why did you travel to London? What was the purpose of
3 that trip?

4 A. This was part of the consulting on the seat -- from the
5 counsel -- from counsel.

6 Q. Okay. I'd like to -- this is Figure 3 from page 10 of
7 your report, and I'd ask you whether you recognize that photo?

8 A. Yes. I believe that's Boots. It's an organization in
9 London, in England, that has cashiers in a seated posture.

10 Q. What is Boots?

11 A. It's a pharmacy much like a Walgreen.

12 Q. Okay. Can you tell us the range of items that they sell
13 at Boots?

14 A. Uhm, primarily smaller things. Like I say, it would be
15 personal items. Other than saying that, it would be comparable
16 to a Walgreen or a pharmacy in the United States. It would be
17 comparable to a pharmacy in the United States.

18 Q. And I can't really tell from this photo, but -- because
19 we're looking at the front of the counter -- are the cashiers
20 at Boots seated or standing?

21 A. They're seated.

22 Q. All right.

23 MR. MATTHEW RIGHETTI: I move --

24 (Document displayed.)
25

1 BY MR. MATTHEW RIGHETTI:

2 Q. Who took this photo?

3 A. I took the photo.

4 Q. Okay. And is it a correct representation of a seated
5 cashier at the Boots store in London?

6 A. Yes.

7 Q. All right.

8 MR. MATTHEW RIGHETTI: And I would move this photo,
9 28C, into evidence.

10 MR. WOHL: Can we have a time on that, your Honor?
11 When did he take the photo?

12 MR. MATTHEW RIGHETTI: Sure.

13 THE COURT: When did you take the photo,
14 approximately? Was it this year?

15 THE WITNESS: It was last year. It was last year. I
16 think it was 2011.

17 THE COURT: Received. Go ahead.

18 (Trial Exhibit 28C received in evidence.)

19 BY MR. MATTHEW RIGHETTI:

20 Q. The next photo is Figure 4 from page 10 of your report,
21 and I'd ask you if you recognize that photo?

22 A. Yes, I believe that's Wilkinson.

23 Q. Who took that photo?

24 A. I took the photo.

25 Q. Approximately -- was that -- we're going to go through

1 several photos of London cashiers -- or England, UK cashiers.

2 Were all these taken around the same time or the same trip?

3 A. Yes, they were all taken in the same trip.

4 Q. So this is Wilkinson's. What is Wilkinson's?

5 A. It's more of a household furniture -- not furniture,
6 household items.

7 Q. What is the range of size of items they sell at
8 Wilkinson's?

9 A. It's broader than it is at Boots. It does have larger
10 items.

11 Q. Okay. And are the cashiers at Wilkinson's seated or
12 standing in the UK?

13 A. They are seated.

14 Q. Did you do any evaluation about approximately how long
15 cashiers in the United Kingdom have done their cashier work
16 while seated, in general?

17 When did seats get rolled out in the UK?

18 A. I do not know that.

19 Q. I can see from this exhibit, which we'll mark 28D, as in
20 David, that the cashier is doing what?

21 A. Uhm, placing an item in the bag for the person.

22 Q. So the cashiers at Wilkinson's, do they do bagging?

23 A. Yes, they do.

24 Q. Do you know if the cashiers at Boots do bagging?

25 A. Yes, they do bagging.

1 Q. We'll go to Figure 5 from --

2 MR. MATTHEW RIGHETTI: Oh, and we'll move 28D into
3 evidence, your Honor.

4 THE COURT: Hearing no objection, received.

5 (Trial Exhibit 28D received in evidence.)

6 BY MR. MATTHEW RIGHETTI:

7 Q. Figure 5 from page 10, the next photo, was this taken on
8 that same trip to London?

9 We'll mark this as 28E, as in echo.

10 A. Yes.

11 Q. And what does this photo show?

12 A. I believe that's Tesco. I can confirm that with my
13 report.

14 THE COURT: You can look at your report.

15 BY MR. MATTHEW RIGHETTI:

16 Q. Page 10 of your report.

17 THE COURT: Please, if you're going to have to resort
18 to belief, I'd rather you confirm it.

19 THE WITNESS: I didn't want to confuse it because it's
20 small area there. There is a Tesco in United Kingdom.

21 BY MR. MATTHEW RIGHETTI:

22 Q. And who took this photo?

23 A. I took the photo.

24 Q. On the same trip?

25 A. Yes.

1 Q. And what does it show?

2 A. It shows a cashier in a seated posture.

3 Q. Do the Tesco cashiers do bagging?

4 A. They ask the person whether they would like it bagged. If
5 they do say yes, they will do the bagging. That's their
6 policy, is to ask them. If not, the majority of the people do
7 not ask it to be bagged.

8 MR. WOHL: Objection, Your Honor, lack of foundation.
9 He hasn't established he knows what their procedure is.

10 THE COURT: How do you know what was just said?

11 THE WITNESS: That's what I was told at the store by
12 the cashiers and the manager.

13 MR. WOHL: Objection, Your Honor, hearsay.

14 THE COURT: Well, it is hearsay, but the rule permits
15 an expert to rely upon hearsay. This falls within that rule,
16 so I will allow it.

17 What is that guy doing with his right hand? Your picture
18 washes out. I can't see what he's doing there.

19 THE WITNESS: He's getting it from the right. This is
20 coming down on the conveyor. And then he will pass it across
21 the scanner.

22 THE COURT: Looks like somebody's buying something
23 that's unhealthy. What is that item? Are those cigarettes?

24 MR. MATTHEW RIGHETTI: It is the UK, after all, your
25 Honor.

1 **THE COURT:** So let's just see if I've got it right.
2 The items come in on the right. And then what does the cashier
3 do with it? Sweeps it across to the left?

4 **THE WITNESS:** Yes.

5 **THE COURT:** Maybe that is healthy. All right.

6 So go back to the outside. So it would then go across,
7 what, a scanner or what?

8 **THE WITNESS:** Yes, that's a scanner in front of him,
9 below his left hand.

10 **THE COURT:** And then once it's registered, it would
11 wind up over there with the paper towels?

12 **THE WITNESS:** Yes.

13 **THE COURT:** I understand that. Thank you.

14 All right. That's 28E?

15 **MR. MATTHEW RIGHETTI:** Yes.

16 **THE COURT:** Any objection?

17 **MR. WOHL:** No, Your Honor.

18 **THE COURT:** Thank you. Received.

19 Go ahead.

20 (Trial Exhibit 28E received in evidence.)

21 **BY MR. MATTHEW RIGHETTI:**

22 **Q.** And the next is 28F. And I'll ask you if you took this
23 photo?

24 **A.** Could I ask to look at the previous one for a second and
25 make sure what I said was correct?

1 I'm trying to decide for sure whether it's going left to
2 right or right to left in that situation.

3 Q. What makes you question what direction it's going?

4 A. The conveyor -- if you focus in on where the left hand is,
5 where the conveyor is there, they do have some that are left to
6 right and some that are right to left.

7 THE COURT: All right. So you're just not certain on
8 that point.

9 THE WITNESS: Yes, I'm not certain which direction
10 that's going.

11 THE COURT: Thank you for the caveat.

12 Let's go to the next picture.

13 BY MR. MATTHEW RIGHETTI:

14 Q. And what does this picture show, which we'll mark as 28F?

15 A. Okay. This again is in -- on page 9. I'm sorry.

16 Q. Would your report refresh your recollection about this
17 photo?

18 A. May I use my report?

19 THE COURT: Yes, you can, if it will refresh your
20 memory.

21 THE WITNESS: This is ASDA. A-S-D-A.

22 BY MR. MATTHEW RIGHETTI:

23 Q. And what does this photo show?

24 A. It shows a seated posture with a person doing checkout.

25 THE COURT: What country is that?

1 **THE WITNESS:** That's at the UK. This was on the same
2 trip.

3 **BY MR. MATTHEW RIGHETTI:**

4 **Q.** What do the ASDA stores sell, in general?

5 **A.** That is a full department store.

6 **Q.** Which means what?

7 **A.** Like Wal-Mart. It's part of Wal-Mart.

8 **Q.** Okay. And what is the range of items that they sell?

9 **A.** Like I say, it's the full range as they would in a
10 Wal-Mart in the United States.

11 **Q.** Okay. And who does the bagging at the ASDA in the UK?

12 **A.** They have the same policy where they ask whether they
13 should -- whether they'd like it bagged or not. Again, the
14 majority of the customers do not have it bagged by the cashier.

15 **MR. MATTHEW RIGHETTI:** And we'll move 28F into
16 evidence as well.

17 **THE COURT:** Received.

18 (Trial Exhibit 28F received in evidence.)

19 **BY MR. MATTHEW RIGHETTI:**

20 **Q.** The -- when you do -- when you approached this case and --
21 did you -- to become familiar with your assignment and to
22 provide an opinion, is there a methodology that you go through
23 that is routine for you, that you've been doing it this long?

24 **A.** Well, yes. You -- you observe the operations. You take
25 measurements of the workstation. And you look at what the flow

1 of materials and flow of the -- the pattern of work that the
2 person does.

3 Q. Okay. And did you attempt to do that in this case?

4 A. Uhm, I did not -- in terms of the measurements, I did not
5 take the measurements myself. I used measurements that were
6 provided by counsel. I used measurements that were provided by
7 Kmart through counsel. They are dimensional drawings. And
8 then I used, toward the end, also the dimensions that were
9 taken by Dr. Fernandez.

10 Q. In the field of ergonomics, what is the -- what is the
11 thinking in terms of the health benefits or lack of benefits of
12 seated versus standing work?

13 A. I would contend that it's a universal statement that it is
14 beneficial to have the opportunity to sit or stand as opposed
15 to requiring. There's a lot of literature on prolonged
16 standing. There's a lot of literature on the disadvantages of
17 prolonged sitting. And the opportunity to sit or stand has
18 benefits. Almost every -- I would guess that every
19 introductory text would make a statement of that type.

20 Q. So when you say there's literature about prolonged
21 sitting, what does the literature generally say about prolonged
22 sitting, the health effects? Good or bad or --

23 A. Prolonged sitting -- the reality is static posture. The
24 problem is static posture. It depends on how static the
25 posture is in the seated situation. But over a period of time,

1 long-term seated operations, if you have to stay in one posture
2 without moving can be detrimental.

3 Q. How about prolonged standing?

4 A. That can be detrimental as well.

5 Q. You say -- did you say it was universal? Explain to me
6 the sit/stand option in the field of ergonomics.

7 A. It is universal within ergonomics. I do not know of an
8 exception that would not acknowledge that the opportunity to
9 sit or stand is beneficial compared to being required to sit or
10 being required to stand.

11 Q. I'll show you Figure 7 from page -- well, for the record,
12 Figure 7, page 28 of the report.

13 Do you recognize this photo?

14 A. Yes. That's one that was provided to me by counsel of the
15 Tulare store.

16 Q. Okay. And what does it show?

17 Can you generally describe what we -- how the Tulare store
18 checkout cashier stations are configured?

19 A. Well, they have the --

20 THE COURT: You can -- Dawn, is it activated so that
21 the witness can draw John Madden-style on the --

22 THE CLERK: It's always working; so, yes, he can.

23 THE COURT: So you can put your finger on the screen
24 and draw a circle or a stick person, whatever you want to do.

25 Now, the lawyers need to know it won't be preserved unless

1 you make a special request, which is problematic. But if it's
2 important enough to you, Dawn can save it. Otherwise, it goes
3 into the ether.

4 But for purposes of illustrating the witness's testimony,
5 you may draw on the picture on the screen, and it may help.

6 So go ahead.

7 **THE WITNESS:** Okay.

8 **THE COURT:** The question was: What does it
9 illustrate?

10 **THE WITNESS:** It illustrates the checkout stand at
11 that particular store.

12 **BY MR. MATTHEW RIGHETTI:**

13 **Q.** And we also have on the easel over here, Exhibit -- I'm
14 not sure which exhibit it is. It's a defense exhibit. I'm not
15 sure what number it is. Oh, here it is. I have it.

16 It's marked as Exhibit -- as slide 2B. And it is, I
17 believe, marked as 215, Exhibit 215.

18 **A.** Could it be put on my thing so I can draw on it here?

19 **Q.** Well, I don't have it to put on there. But is this
20 roughly -- when you look at what's on the Elmo, which is --
21 we'll mark as 28G, as compared to slide 2B, Exhibit 215, is
22 there any difference in the layout?

23 **A.** Not that I can see. I don't believe there is.

24 **Q.** All right. So what -- explain for us what the -- what the
25 work tools are and the workflow that goes on for cashiers at

1 the currently configured checkout station at Tulare?

2 **A.** Okay. The customer comes from the aisle down this
3 direction and places items on the cabinet or on the counter in
4 that area. The cashier takes the items from there, takes them
5 across the scanner that is about in this area, sets them on the
6 demagnetizer, which is this area right here, here. (Witness
7 indicating.)

8 After that is done, they will tend to bag them. But in
9 the meantime, they also will use the -- touch the monitor.
10 That's a touch screen monitor here. They also will use the
11 keyboard that's right there (indicating).

12 They also will need at times to scan cards, individual
13 small credit card things, on a slot up here by swiping it
14 across on the top part of the -- this is referred to as the
15 POS. The cash register part of it is referred to as the POS.
16 Those are the primary things they do at that point in the
17 process of the transaction.

18 Then they will either bag the items on the demagnetizer
19 here, or they will bag them by dropping them down into this bag
20 well here. And then they will move them over to the bagging
21 table here. That's the general layout.

22 At that point then they will take the money from the
23 customer. They will get the receipt from this area right up
24 here (indicating) and then also get coupons from an area that's
25 right up here during this process, as well.

1 At times they do have to reach around here to this item,
2 which is the credit card device, to reactivate that.

3 I think those are the general tasks performed with that
4 station.

5 **THE COURT:** If you move that picture, all the drawings
6 get moved. Don't move, so -- it will become misaligned. So
7 keep that in mind whenever you -- all right.

8 **MR. MATTHEW RIGHETTI:** We would move 28G, just the
9 picture of a Tulare checkout station --

10 **THE COURT:** Any objection?

11 **MR. WOHL:** No, Your Honor.

12 **THE COURT:** Received.

13 (Trial Exhibit 28G received in evidence.)

14 **BY MR. MATTHEW RIGHETTI:**

15 **Q.** I'm going to now put on slide 1A from Dr. Fernandez, which
16 is 215, I believe.

17 **THE COURT:** You keep saying that, but -- is that
18 correct? Do we have the right -- are you referring to the
19 correct numbers?

20 **MR. MATTHEW RIGHETTI:** It's Bates 905, and it was a
21 group of -- that's a group of photographs. And the first --
22 the -- go ahead, Jeff.

23 **MR. WOHL:** I'm told it's 216.

24 **MR. MATTHEW RIGHETTI:** 216. So these group of
25 photographs are Exhibit 216; the first one being slide 2B,

1 which is up on the easel, and the second one being what we now
2 have on the Elmo as slide 1A.

3 **THE COURT:** All right. The one up on the easel has
4 not been moved into evidence. Did you move it into evidence?

5 **MR. MATTHEW RIGHETTI:** No.

6 **THE COURT:** I just misunderstood?

7 **MR. MATTHEW RIGHETTI:** We would move the -- what we
8 would mark as 216A into evidence, because that's a whole group
9 of photographs, some of which are the subject of your order
10 this morning.

11 **MR. WOHL:** So just for clarity, your Honor, this is
12 part of the Fernandez slides that they then want to put into
13 evidence.

14 **THE COURT:** I'm confused.

15 **MR. WOHL:** This part we're okay with.

16 **THE COURT:** Mr. Righetti, you made all that fuss.

17 **MR. MATTHEW RIGHETTI:** I talked to Mr. Wohl and
18 Ms. Sommerfeld at the break, and made clear to them that our
19 motion had to do with what began as Slide 3 on, and did not
20 have to do with Slides 1 and 2, which are just the as-built
21 configurations. And I thought we had an agreement that those
22 were okay.

23 **MR. WOHL:** Well, all I'm reporting, your Honor, is
24 that they -- that these are exactly as late produced as the
25 rest of them, but they're -- they're okay with these. They're

1 not objecting to these. They're objecting to the rest of them.

2 **MR. MATTHEW RIGHETTI:** I don't have a problem. I
3 don't care. Just --

4 **THE COURT:** It's okay. Since they are late produced,
5 I don't have any problem with them cherry-picking and using the
6 ones that help them, if they think that, since it's late
7 produced. So unless there's a rule of completeness problem,
8 then it gets more complicated.

9 **MR. WOHL:** That's fine, Your Honor. Thank you.

10 **THE COURT:** So 216 -- what is that over there, that
11 easel? What is that going to be called, 216 what?

12 **MR. MATTHEW RIGHETTI:** 216A, as in apple.

13 **THE COURT:** That is -- this is so confusing,
14 Mr. Righetti.

15 All right. 216A is received in evidence.

16 (Trial Exhibit 216A received in evidence.)

17 **THE COURT:** And then you had another one.

18 **MR. MATTHEW RIGHETTI:** 216B is what we have up on the
19 Elmo.

20 **THE COURT:** All right. Received in evidence.

21 (Trial Exhibit 216B received in evidence.)

22 **BY MR. MATTHEW RIGHETTI:**

23 **Q.** So looking at what's on the Elmo, 216B, is this the same
24 or different than the -- than the -- strike that.

25 What does this show?

1 **A.** This is a graphic that illustrates and labels the items
2 that are in the workstation at Tulare, as I understand.

3 **Q.** Okay. Can you see on this and can you identify the
4 different work items or processes that are used by the cashier
5 during checkout?

6 **A.** Yes. Again, to go through what we just did, they're
7 coming down -- they're set on the counter in that area right
8 there, the product. When the customer brings it, they take it
9 out of their cart and will set it on the counter here.

10 The cashier will take the item, take it across the
11 scanner, which is right here, then set it on the demagnetizer
12 here. (Witness indicating.)

13 **THE COURT:** Can I ask you to do it a different way?

14 Go back and erase all of those circles, Dawn.

15 All right. I want you to use 1, 2, 3, and do it in
16 sequence. And then I'm going to ask Dawn to capture that
17 image. Don't move the picture on the Elmo. Otherwise, it will
18 get misaligned.

19 All right. Start over with the 1, 2, 3. I know you're
20 just doing it in a crude way, but that will help me to
21 understand it. Go ahead.

22 **THE WITNESS:** So the items are put on the counter at
23 1, on -- at that position. Then they're taken across the
24 scanner at the 2 --

25 **THE COURT:** You don't have to circle. Start over and

1 do it my way.

2 **THE WITNESS:** Yes.

3 **THE COURT:** My way is put in a 1, put in a 2. You
4 don't have to circle. You can't draw, it's not your fault.
5 The machinery is not accurate enough.

6 There's the 1.

7 **THE WITNESS:** That's the counter that the items are
8 placed on. This is the scanner that they're passed across.

9 **MR. MATTHEW RIGHETTI:** What number is that?

10 **THE WITNESS:** Number 2.

11 **THE COURT:** What is the purpose of that?

12 **THE WITNESS:** It is a security device that
13 demagnetizes the items so that they don't ring as they go
14 through the front door.

15 **THE COURT:** All right.

16 **THE WITNESS:** Then they will tend to be piled there
17 and then they are placed in the bag, either on the rack here in
18 this bag well or they will be actually -- that would be 4-A, or
19 they will be bagged with 4 -- that's a 4 -- A on the
20 demagnetizer.

21 As they are doing this, one of the things that they are
22 doing is they are accessing the keyboard, which is 5. They are
23 also accessing the monitor, which is 6.

24 And then after they have taken and filled the bags, they
25 will move it to the table that's toward us that is not shown on

1 this photograph. They will then take the money from the
2 customer. They will use the cash --

3 **THE COURT:** Put a number 7 down there in the bottom
4 left and an arrow that points -- you can barely see that table.

5 **THE WITNESS:** 7 going that way.

6 **THE COURT:** Put an arrow that way. I got it. Thank
7 you.

8 **THE WITNESS:** Okay, 7.

9 All right. Then they will get the money from the
10 customer. That would be over here at 8. I can put it here.

11 **THE COURT:** What happens to the coupon part?

12 **THE WITNESS:** We haven't gotten to that point yet.
13 They could have the coupons at any time in this process. I'm
14 not sure what the order of getting the coupons is.

15 **THE COURT:** Those two circles are 8?

16 **THE WITNESS:** That's an 8. That's an 8.

17 Then they have the receipts, which are 9 -- oh, there is
18 another thing that I forgot up here, and that's swiping,
19 potentially swiping the card across the swipe up here, if they
20 are using a card for reasons, for certain reasons. And I'm not
21 sure what that is.

22 Again, the order -- well, let me put 9 because I'm not
23 sure when that occurs, but it's one of the things that occurs
24 during the process. But that will generally occur during the
25 transaction, but before the time that they are paying for it.

1 So then after that they will use 10 up here, which is the
2 receipt.

3 And then we also had the 11, is the -- at some point in
4 this process they will access the coupon dispenser there.

5 Then 12, the other thing that they will interact with is,
6 this is the credit card device where sometimes they have to
7 reset that, or my perception is they have to reset that.

8 **THE COURT:** So are you done to with that?

9 **THE WITNESS:** Yes.

10 **THE COURT:** Dawn, can you capture that image so I can
11 look at it later?

12 And, counsel, I think there is a way for Dawn to send that
13 image to both of you. If so, she will do that.

14 **MR. WOHL:** Do you need an email or something, your
15 Honor?

16 **THE COURT:** She will tell you. She knows how it
17 works. But it's easier than I am suggesting. I think she can
18 do it pronto.

19 **MR. WOHL:** Thank you, your Honor.

20 **MR. MATTHEW RIGHETTI:** This will be 216-C.

21 **THE COURT:** What is that? The one with the numbers on
22 it?

23 **MR. MATTHEW RIGHETTI:** Yes.

24 **THE COURT:** The number is 216-C. That's what that's
25 going to be. We'll call that annotated photo.

1 (Trial Exhibit 216-C marked for identification)

2 **THE COURT:** All right. Go ahead.

3 **THE WITNESS:** Could I --

4 **MR. MATTHEW RIGHETTI:** Can we move that into evidence
5 as well?

6 **THE COURT:** Did you want to adjust something?

7 **THE WITNESS:** No. I would like to add a couple items
8 that occur sometimes.

9 **THE COURT:** Sure.

10 **THE WITNESS:** Sometimes they will take the hangers off
11 of the clothing and drop them down into this area.

12 What number are we up to? Is that 13? Just to keep it
13 separated. And there is also trash areas where they may put
14 trash. That's 14.

15 **THE COURT:** With that curve ball the witness has
16 thrown us, you will have to copy a second document. That will
17 be 216-D. We have C and D as annotated photos.

18 (Trial Exhibit 216-D marked for identification)

19 **THE COURT:** Okay. Please continue on, Mr. Righetti.

20 **BY MR. MATTHEW RIGHETTI:**

21 **Q.** So when you evaluated the work of the Kmart cashiers when
22 they are stationed at the checkout counters, did you make a
23 determination as to whether the work functions could be
24 performed in a seated -- from a seated position, regardless of
25 the checkout counter configuration as it currently is in

1 Tulare?

2 **A.** When you say "regardless of the" --

3 **Q.** Strip away the currently configured checkout counter in
4 Tulare and just look at what is done by the cashier at the
5 checkout station in Tulare.

6 Did you evaluate whether that work that is done at the
7 checkout station at Tulare could be performed from a seated
8 position?

9 **A.** Oh, yes. If you were going to -- if you're saying, if you
10 were starting from scratch, could you configure a checkout
11 stand that could be performed in a seated posture? The answer
12 is yes.

13 **Q.** That's my question. The answer would be yes?

14 **A.** Yes.

15 **Q.** When you evaluated this currently configured checkout
16 station at Tulare, did you feel it was well designed
17 ergonomically for a standing posture cashier? What was your
18 opinion on that?

19 **A.** Well, I think there definitely could be some improvements,
20 even with respect to a standing operation.

21 **Q.** Do you have any understanding of when this cash register
22 station was constructed?

23 **A.** The dimensional drawings that I received from counsel were
24 1991 and I don't know -- that's the only information I would of
25 have.

1 Q. So what improvements for a standing cashier would you --
2 would come to mind from an ergonomic standpoint?

3 MR. WOHL: Objection, your Honor, lack of relevance.
4 I'm not making a standing claim. I'm making a seating claim.

5 MR. MATTHEW RIGHETTI: I will withdraw the question,
6 your Honor.

7 THE COURT: Thank you.

8 BY MR. MATTHEW RIGHETTI:

9 Q. Did you do an evaluation to determine whether there could
10 be improvements to this checkout station at Tulare that would
11 accommodate a seated cashier?

12 A. Yes, I did. And my -- my objective in this was to not
13 look at a seated only cashier. That was not the objective.

14 My object was to look at it as could you have a sit and/or
15 stand, where the person can sit or stand at their choice. So
16 it was not to develop as Aldi is, a seated-only operation. It
17 was to develop a sit or stand operation.

18 So I was also looking at how some of the changes would
19 affect the standing part of that work station, as well as
20 rather the seat.

21 Q. Was there anything about the currently configured checkout
22 stations at Tulare that were an impediment to dropping a seat
23 in? Could you just drop a seat in there now and let cashiers
24 do their work?

25 A. No. There are items -- one of the things for a seat is

1 you need to have room for the knees so that you can get close
2 to the item that you're working with. And the items underneath
3 were -- would need to be adjusted.

4 Q. May I show you another photo from your report and ask you
5 if you -- from Exhibit 28 and ask you if you recognize that
6 photo?

7 A. Yes.

8 (Photograph displayed.)

9 Q. What is that?

10 A. That's just the area underneath, right now underneath the
11 counter. And this, number one here, is the lower part of the
12 scanner. And that's the constraint in terms of what width the
13 counter would be.

14 Q. What is the -- so the counter has a certain -- strike
15 that.

16 So the scanner that's on top of the table has a certain
17 depth to it, correct?

18 A. Yes.

19 Q. What is the depth at Tulare?

20 A. Five-and-a-half inches.

21 Q. Okay. And what is available on the market for scanners?
22 Is that about standard for what's on the market now in terms of
23 depth?

24 A. No. The new scanners are referred to as low profile.
25 They are much thinner.

1 **THE COURT:** I didn't understand. What is
2 five-and-a-half inches?

3 **THE WITNESS:** The scanner that is right above this, at
4 position one, the mechanism for the scanner is what is the
5 constraint on how thick this --

6 **THE COURT:** I don't see -- can I see what you're
7 talking about or is that washed out? Is the --

8 **MR. MATTHEW RIGHETTI:** It's protruding under the
9 counter.

10 **THE WITNESS:** Well, it's actually not protruding
11 because we're looking from the bottom, so it's actually at the
12 same level as the bottom of the counter at this point.

13 **THE COURT:** All I want you to do is indicate by
14 drawing a line what is the five-and-a-half inch distance?

15 **THE WITNESS:** Okay. The five-and-a-half inch -- okay.
16 Am I doing it?

17 **MR. MATTHEW RIGHETTI:** No, Zach was. What did you do?

18 **THE CLERK:** You hit the clear. It's just if you go
19 too far up, it will start getting --

20 **THE COURT:** When you hit the corner, sometimes it
21 activates those settings.

22 **THE CLERK:** Right.

23 **THE COURT:** All right. Do it again. Let's do this.
24 See where you've got the blue squiggle --

25 **THE WITNESS:** There will be a better one later, I

1 think, that will illustrate that.

2 **THE COURT:** All right. I will pass it for now. Thank
3 you.

4 **THE WITNESS:** Here, underneath there is what would
5 have to be moved or readjusted for you to have knee room to be
6 able to slide in a comfortable posture with your legs
7 underneath the counter.

8 **THE COURT:** Where is the cash register on that
9 picture?

10 **THE WITNESS:** It is on our right.

11 **THE COURT:** And then so the flow of goods would be
12 from the right side going across the scanner to the left?

13 **THE WITNESS:** Yes.

14 **THE COURT:** And then the cash register is hidden from
15 view, but off to the right, okay. I kind of got it.

16 I still don't understand the five-and-a-half point, but
17 you say we'll get to that later.

18 **THE WITNESS:** Yes. There will be a better one, I
19 think.

20 **BY MR. MATTHEW RIGHETTI:**

21 **Q.** So can you see the -- does this photo, which is 28-G --
22 no, 28-H. Pardon me, 28-H. Does this provide a description of
23 the impediments for leg room underneath the counter in the
24 current configuration?

25 **A.** Yes. It would be these -- these, one and two, would have

1 to be moved, resized and moved to have -- at least one would.
2 Two would have to be resized. One would to have been removed
3 to have room for the legs in a seated posture.

4 **THE COURT:** What are those things?

5 **THE WITNESS:** This is the underneath of the counter.

6 **THE COURT:** What are those plastic things?

7 **THE WITNESS:** Oh, one of them is trash, is my
8 understanding. The other one is return items and where they
9 drop the hangers.

10 **THE COURT:** Dawn, we're back to having the color
11 wrong. It's white now. It's hard to see. If we can put it
12 red, green or blue.

13 **THE CLERK:** Yeah. The color settings --

14 **MR. DOSTART:** I seem to have touched it. All right.

15 **THE COURT:** I've got the 1 and the 2. You don't have
16 to change that.

17 All right. So those are impediments. Go ahead.

18 **BY MR. MATTHEW RIGHETTI:**

19 **Q.** And over here you see this -- I can't mark it.

20 We can see on this Elmo or on this screen -- there we
21 go -- marked in red, what is that marked in red?

22 **A.** This is on the left-hand side. Again, we'll have one that
23 I think shows this better later, but this is a vertical that
24 would need to be moved. But we have one later that would show
25 that better, I believe.

1 **MR. MATTHEW RIGHETTI:** We'll move 28-H into evidence
2 your Honor.

3 **MR. WOHL:** I'm sorry, your Honor.

4 Can the witness just verify, when he says "the vertical
5 that would have to be moved," what is he referring to?

6 **THE COURT:** You see that magenta color on the left
7 side?

8 **MR. MATTHEW RIGHETTI:** It's the vertical support on
9 the left side.

10 **THE COURT:** That's what he's referring to.

11 **MR. MATTHEW RIGHETTI:** Just underneath the
12 demagnetizing.

13 **THE COURT:** All right. 28-H is received.

14 (Trial Exhibit 28-H received in evidence)

15 **BY MR. MATTHEW RIGHETTI:**

16 **Q.** Is this a -- is this one of the photos that shows things
17 better?

18 **A.** Yes. Well, that illustrates one of the areas that I would
19 change in terms of making this what I consider to be a better
20 design to be more efficient.

21 **THE COURT:** I've just got to tell you, whoever took
22 these photographs, these are some of the worst photographs I
23 have ever seen.

24 **MR. McINERNEY:** That would be me, your Honor.

25 **THE COURT:** Mr. McInerney, that -- look how blurry

1 that is. There is nothing in focus in that whole picture.

2 **MR. MCINERNEY:** You should see the ones I took of my
3 burros.

4 **THE COURT:** Really. It hurts my eyes to try to strain
5 to see -- I can't even tell what that picture is.

6 **MR. MCINERNEY:** Your Honor, everybody says that.

7 **THE COURT:** Well, but it's not a funny thing. I've
8 got to decide based on your evidence.

9 All right, go ahead.

10 **BY MR. MATTHEW RIGHETTI:**

11 **Q.** So when you did your evaluation, did -- and you went to
12 the Tulare store, correct?

13 **A.** Yes.

14 **Q.** Did you see any difference in the configurations of the
15 checkout counters at Tulare? Do you know how many checkout
16 stations there were at Tulare?

17 **A.** I'm not sure what the number was. I'm not sure. I don't
18 remember how many.

19 **Q.** Were there differences in the physical configurations of
20 the checkout counters at Tulare?

21 **A.** I was focusing -- I think they are the same, but I'm not
22 positive about that.

23 **Q.** And I think you've already testified that if you started
24 from scratch, you could design a work station that could
25 accommodate a seat for the work that's done at the checkout

1 station by Kmart cashiers at Tulare?

2 **A.** Yes.

3 **Q.** If you were not working from scratch and you wanted to
4 modify the current configuration, did you evaluate that?

5 **A.** Yes.

6 **Q.** And what would you do to -- from an ergonomic standpoint
7 to modify the currently configured Tulare checkout stations so
8 that they could accommodate a seat?

9 **A.** Okay. Let me mention a couple things from -- if I can try
10 to use the -- this. This right there is the POS (indicating).
11 That's the cash register, that point right there.

12 **THE COURT:** For the record, the witness is referring
13 to the -- what is marked slide 2-B, which I think has a
14 different designation now. It's in evidence.

15 That's fine. You're using a laser pointer to do that.

16 That's fine. There won't be any record later. That's fine.

17 Go ahead.

18 **A.** One of the issues for both the standing and a seated
19 operation is the reach to this position on the counter
20 (indicating).

21 When the customers -- most of the time the customers will
22 put items on the counter. As it gets emptied, they will move
23 them down this direction so that it's more easily reached by
24 the cashier. But this distance out here is a long reach in the
25 current configuration (indicating). I think it's about

1 37 inches.

2 This is the POS. That's the cash register. This is an
3 area than we can show you on other slides later. This area
4 right there (indicating) and the area behind it caused this to
5 be on a shelf that's much larger than it needs to be. If this
6 were moved back and that was cut off, that reach would be much
7 less by being able to get into this area. That would be one of
8 the things that would make it...

9 **BY MR. MATTHEW RIGHETTI:**

10 **Q.** So one of the things you would do is shorten up the stand
11 that the cash register is currently sitting on?

12 **A.** Yes.

13 **Q.** And how would that be an improvement?

14 **A.** That would make the reach to this corner much less. Right
15 now it's what we would refer to as ineffective worker moment.
16 Ineffective worker movements are in lean manufacturing or lean
17 processes they are talked about as non-value added. In other
18 words, the extra reach takes time, takes effort. It makes a
19 slower operation.

20 **THE COURT:** Is that a -- I can't tell from what you've
21 said so far. Is there a conveyor belt there?

22 **THE WITNESS:** No. It is a counter.

23 **MR. MATTHEW RIGHETTI:** Tulare does not have conveyor
24 belts.

25 **MR. WOHL:** So stipulated, your Honor.

1 **A.** So that is one of the things that I would change.

2 Another, from an ergonomic standpoint -- from an
3 efficiency standpoint, I should really say, is the idea of
4 taking items from this level on the counter and dropping them
5 down into the bags here and then lifting them back up to the
6 other table.

7 If I were -- if it were my option, I would move the table
8 closer, put the bags on the other side so that they could just
9 slide things on across instead of dropping them down.

10 One of the things in terms of efficiency in motion is you
11 never take items, particularly heavy items, drop them down and
12 lift them back up again.

13 So those are two things that would make it easier from my
14 standpoint. It would make it feasible for a seated and better
15 for a standing operator.

16 **BY MR. MATTHEW RIGHETTI:**

17 **Q.** What other items, what other modifications would you make?

18 **A.** Can we go back to the previous thing that you had on the
19 Elmo?

20 (Photograph displayed.)

21

22 **Q.** Would this one be good?

23 **A.** No. It was the one.

24 **Q.** This one?

25 (Photograph displayed.)

1 A. Yes.

2 Q. We now have 216-C, is what you're referring to now.

3 A. Okay. One of the things is the coupon is higher than it
4 needs to be. As you look at it, it's just on a piece of PVC
5 coming up or a piece of pipe. And literally people have to --
6 that's above shoulder level for operators and they have to
7 reach up that high. So bringing that down is something that
8 would be easier both for a standing operator and a sitting
9 operator.

10 It's also the distance, the reach distance is higher than
11 it needs to be. Putting it in a different position would be
12 better in that case.

13 Q. Well, is the coupon printer attached to the cash register?

14 A. No.

15 Q. Tell us -- we can't see on this exhibit what it's attached
16 to, but what does the apparatus look like?

17 A. It's on a pipe coming up here (indicating). It sets on
18 that counter, comes up, and it's on a pipe coming up this
19 direction and then it has a shelf there.

20 Q. How are the wires fed to it?

21 A. I'm sorry?

22 Q. Do the wires -- do you understand the wires come through
23 the pipe?

24 A. Yes.

25 Q. Okay. And what is it about the current configuration of

1 the coupon printer that's --

2 **A.** Both the height and the reach distance are higher than
3 they should be.

4 **Q.** Seated, standing or both?

5 **A.** Both.

6 **Q.** Why is it higher than they should be?

7 **A.** It's unnecessary to have the shoulder go -- or have the
8 elbow go above shoulder level.

9 **Q.** So where would you recommend that be moved?

10 **A.** It would be put in this area right here (indicating).
11 Again, this can be moved over slightly as well.

12 **THE COURT:** What does "this" mean?

13 **THE WITNESS:** Oh, the POS as well.

14 **A.** But in general what it amounts to is putting it in a
15 better location. There are many -- many different positions
16 you can put it in. All I'm getting at here is it's a higher
17 position than is desirable right now.

18 The other thing that's awkward a bit is the position of
19 the credit device. And, again, from my standpoint, having that
20 rotate so that they can more easily access it would be an
21 advantage for both the sitting and the standing person.

22 **BY MR. MATTHEW RIGHETTI:**

23 **Q.** You are referring to the credit card reader?

24 **A.** The credit card reader here.

25 **Q.** And who uses that primarily?

1 A. The customer uses it at this point. And from time to time
2 the cashier does interact with it.

3 Q. So in its current configuration the credit card reader,
4 when the cashier has to interact with it, what's the impact of
5 that?

6 A. It's awkward. They either need to walk around to do it.
7 Some of them do that or reach across to do it.

8 Q. And your recommendation --

9 A. Would be to either pull it off and be able to use it that
10 way or turn it around.

11 Q. Have you gained knowledge about whether Kmart is --
12 whether any of those credit card readers can be pulled off?

13 A. Yes, they can. I think that Kmart is looking at doing
14 that relative to an ADA situation now.

15 Q. So we have several modifications: Moving the coupon
16 reader closer and lower; putting the credit card reader on a
17 swivel or so it can be popped off.

18 What other modifications would you recommend?

19 A. Putting this check writing on the other side so that after
20 people -- after they are scanned and set here, people can take
21 the items straight off of this area. This is an obstruction
22 from the standpoint of people being able to take items directly
23 off of that area, of the demagnetizer into their basket.

24 Especially if you're dealing with things like a 12-pack of
25 Coke or something like that. What you really would like to do

1 is bring it down -- not lift it up, just pull it along. Scan
2 it, set it here and have the person be able to take it without
3 lifting it to that table on the other side.

4 **Q.** Any other modifications that you would recommend? Are
5 there modifications to get leg room underneath?

6 **A.** The other photographs will illustrate that.

7 **THE WITNESS:** We'll move -- I don't think we moved
8 into evidence 28-I, which I have now back up. So I would move
9 that into evidence.

10 **THE COURT:** Should we clear this one? Dawn will need
11 to clear the writing.

12 28-I, any objection?

13 (No response.)

14 **THE COURT:** Received.

15 (Trial Exhibit 28-I received in evidence)

16 **BY MR. MATTHEW RIGHETTI:**

17 **Q.** 28-J we have up now.

18 (Photograph displayed.)

19

20 **Q.** Does this show the modifications to the -- more
21 modifications to the checkout station?

22 **A.** Yes.

23 **Q.** Recommended by you?

24 **A.** This would be for both -- well, for a seated operation, to
25 have room for the knees, which is critical, this divider there,

1 the dividers that are pointed out by the yellow would need to
2 be removed.

3 **Q.** Okay. And we have a toe kick down at the bottom. Would
4 the toe kick stay or would the toe kick go?

5 **A.** No. The toe kick would go. In other words, you would
6 have a foot rest further underneath for people to use as a foot
7 rest when they are sitting.

8 **MR. WOHL:** I'm sorry, your Honor. Could the witness
9 just specify what he means by "toe kick"? I don't think he's
10 marked that, so I'm not sure.

11 **THE COURT:** I don't know what that means. So what
12 does that mean?

13 **THE WITNESS:** Is that what you're referring to?

14 **THE COURT:** Toe kick.

15 **THE WITNESS:** The shelf at the bottom (indicating)?

16 **MR. WOHL:** I'm sorry. The witness identified the toe
17 kick.

18 **THE COURT:** The witness used the phrase. It must mean
19 something to you.

20 **A.** I think you initiated the phrase and I was trying to
21 explain what it was.

22 **BY MR. MATTHEW RIGHETTI:**

23 **Q.** I was trying to reference the bottom of the photograph.

24 I think you testified that you need room for your knees,
25 right?

1 A. Yes. That lowest shelf would need to be removed as well.

2 Q. Okay. That's what I was referring to as the toe kick.

3 MR. WOHL: So the toe kick is the lowest, bottom
4 shelf.

5 THE WITNESS: I don't use the word "toe kick."

6 BY MR. MATTHEW RIGHETTI:

7 Q. Okay. Lowest bottom shelf. "Toe kick" got everybody
8 confused.

9 So you remove that lowest bottom shelf and what benefit do
10 you get by removing the bottom shelf?

11 A. One of the aspects of this is when you -- this is a stand
12 or sit operation. So when you're standing, you will not have
13 the stool in your way. So at that point you could shift the
14 stool into the area shown here (indicating).

15 Q. On this photo you see an orange -- something orange and
16 you also see there the bin underneath it. Do you see those two
17 things?

18 A. Yes.

19 Q. Would those be able to stay where they are under your
20 modification?

21 A. No. They would be moved.

22 Q. Where would they be moved?

23 A. Yes. And they would be moved into -- either into this
24 area over in here that we showed on that photograph before.

25 There was a large area back in the corner, below where they put

1 the items on the shelf, or they could be moved in -- the other
2 alternative is if you a bring that other drive to this, that
3 other counter or --

4 **Q.** The Bagging counter?

5 **A.** Bagging counter here they, could be put into the bagging
6 counter as well.

7 The other thing here is that this lip up here
8 (indicating), I recommended would be cut off because it doesn't
9 serve a purpose. In fact, at the Fayetteville office, the
10 Fayetteville store that I visited they have already cut this
11 part off to make it so that it doesn't -- it just is an
12 obstruction at this point.

13 The other thing is this, the demagnetizer is not as deep
14 as the -- this is that five-and-a-half inches we were talking
15 about right here. That's the width of the -- from the counter
16 top here to the bottom of the scanner. That's five-and-a-half
17 inches.

18 And then coming across here, I would cut this off to
19 five-and-a-half because there's nothing behind here that is a
20 problem. It's only a barrier.

21 At that point, then, that would allow the person to sit
22 with their legs underneath the --

23 **THE COURT:** Could they sit with the -- let's assume
24 the five-and-a-half is legitimately there. So would somebody
25 be able to sit underneath there with the five-and-a-half inches

1 as now configured?

2 **THE WITNESS:** Are you saying leaving this part on
3 (indicating)?

4 **THE COURT:** No. I'm just talking about the
5 five-and-a-half.

6 **THE WITNESS:** No.

7 **THE COURT:** Assume that the five-and-a-half is a
8 given. Is there enough room under there for somebody to sit?

9 **THE WITNESS:** Yes.

10 **THE COURT:** Put their legs?

11 **THE WITNESS:** Yes. And my assumption is the
12 five-and-a-half is a constraint, that the -- when I was looking
13 at this and evaluating whether it was possible to do it seated
14 or not, that having a narrower scanner was not an option, that
15 we would use this.

16 It would be advantageous to have a narrower scanner, but
17 this would work out all right to have the five-and-a-half. But
18 at this point over here, to have it be so that the -- what
19 you're trying to do is get the person up, so their upper arms
20 and shoulders are in a comfortable posture. So you want to get
21 the person as high as possible. To get the person as high as
22 possible, then you would want to cut this off so that there is
23 room for the legs at that point (indicating), and there is
24 nothing behind that.

25 **THE COURT:** All right. Go ahead.

1 **BY MR. MATTHEW RIGHETTI:**

2 **Q.** Let me show you the next -- this, I think, segues to what
3 we were talking about.

4 You recognize this, which is going to be 28-K?

5 (Document displayed.)

6 **Q.** What is this?

7 **A.** This is just an illustration in my report to indicate that
8 you can design a work station so that it's both a sitting and a
9 standing operation. This happens to be a fifth percentile
10 female, and with the idea that you can -- you can design it so
11 that a person can either sit at the work station or stand at
12 the work station without a problem.

13 **Q.** So when you're doing the ergonomics design, you must
14 certainly appreciate that not every person is the same height,
15 weight, arm length, leg length, et cetera, right?

16 **MR. WOHL:** Objection, your Honor. Leading.

17 **THE COURT:** It's preliminary enough. You can lead on
18 a preliminary matter. This is an obvious point.

19 Okay. Go ahead. Overruled.

20 **BY MR. MATTHEW RIGHETTI:**

21 **Q.** How do you accommodate -- or do you try and accommodate
22 the different known physical differences from one person to the
23 next?

24 **A.** Yes. You try to accommodate as many people as you can.
25 And when you're doing that, then what you have is two things.

1 One is, you have clearances and on a clearance you're
2 accommodating the 95th or the 99th percent- -- the very large
3 person on the argument that if the large person can fit, then
4 the small person can fit. At that point you're accommodating
5 the very large person.

6 If you're talking about reach, distances, then you're
7 accommodating the shorter person on the argument that if a
8 short person can reach it, then a tall person can as well.

9 The way you establish the seat height, though, and the
10 maximum seat height is you want to have the shoulders and the
11 arms in a comfortable posture. So you want to have the person
12 get as high as possible so that that's in a comfortable
13 posture. To do that, you end up with this being a constraint,
14 is the area underneath the counter. And now the maximum seat
15 height is this height, which is 30. That's the 26 -- or
16 36 inches --

17 **Q.** When you say "this height"?

18 **A.** This is on the Kmart Tulare case.

19 **Q.** Nothing is coming up on the Elmo though. Are you writing
20 on the Elmo?

21 **A.** Oh. I drew a cross here. That is -- at Tulare that's
22 36 inches.

23 **Q.** Okay.

24 **A.** So what you're trying to do is you're trying to get the
25 person as high as possible. So what you're doing is you're

1 taking the smallest thigh thickness, you're taking the bottom
2 of the counter and subtracting the smallest thigh thickness to
3 get what the maximum seat height is. It's not related to the
4 tallest person.

5 **MR. WOHL:** I'm sorry, your Honor. Can counsel just
6 clarify? When he says "36 inches," does that take into account
7 the five-and-a-half inches for the scanner or is that without
8 taking that into account?

9 **THE WITNESS:** Yes.

10 **THE COURT:** What was -- is it the vertical line that
11 you're saying is 36 or the horizontal line?

12 **THE WITNESS:** I would like to use this not relative to
13 the Tulare -- when you mentioned that, I would like to use this
14 as an illustration of talking about how you set the seat height
15 that was in the report as opposed to talking about the Tulare.
16 This is does not represent Tulare right here at this point.
17 This is just a demonstration.

18 **THE COURT:** I understand you're demonstrating, but are
19 you trying in some way to teach us something about what the
20 heights could be at Tulare?

21 **THE WITNESS:** No. Let me not do that at this point.

22 **THE COURT:** Okay.

23 **BY MR. MATTHEW RIGHETTI:**

24 **Q.** When you say fifth percent and 95th percent, that's
25 according to who? Where do these fifth percentile and 95th

1 percentile --

2 **A.** A fifth percentile person, only five are smaller than. A
3 95th percentile person, only five percent are taller.

4 **Q.** According to what?

5 **A.** According to the anthropometric data that are taken.

6 There are many different sources of anthropometric data. I
7 prefer Kodak. Kodak uses workers in the United States as a
8 group to evaluate.

9 **Q.** And the width of the current Tulare checkout counter is
10 what? From the point where the counter starts on the
11 customer's side to the point where the cashier is, what is the
12 width of that?

13 **A.** Twenty-three inches.

14 **Q.** Twenty-three inches, all right.

15 **THE COURT:** What is the height then? Now if we're
16 talking about Tulare, what is the height then: That vertical
17 line that you have there, arrow, what is that height at Tulare,
18 taking into account the five-and-a-half inches?

19 **THE WITNESS:** The height of the counter is 36 inches
20 from the floor?

21 **THE COURT:** So we take off five and a half?

22 **THE WITNESS:** Yes.

23 **THE COURT:** That would be thirty and a half.

24 **THE WITNESS:** Thirty and a half is the bottom of this.

25 And then it turns out that the smallest thigh thickness of the

1 fifth percentile person -- and, again, there is nothing magic
2 about the fifth percentile person. If you decide to design for
3 the second percentile person or 99 percent of the people, that
4 is not a problem.

5 **THE COURT:** Do we have a yardstick here, Dawn?

6 **MR. MATTHEW RIGHETTI:** We have a tape measure.

7 **THE CLERK:** No.

8 **THE COURT:** Can I see your tape measure for a minute?

9 **THE COURT:** Would you hand it please to Dawn? I want
10 to have in mind what thirty-and-a-half inches is.

11 (Tape measure was tendered to the Court.)

12 **THE COURT:** For the record, I have on the bench --
13 it's 27 inches from the floor to the bottom of my bench. So
14 thirty-and-a-half inches is even more than what I have up here.

15 Okay. Thank you.

16 (Tape measure was returned to counsel.)

17 **THE COURT:** Not that the bench is perfect. It's just
18 something that judges on appeal might use as a benchmark.

19 Okay. Yes, Mr. Wohl?

20 **MR. WOHL:** No, no. I'm just observing the tape
21 measure.

22 **THE COURT:** Please continue on.

23 **BY MR. MATTHEW RIGHETTI:**

24 **Q.** And if you -- if you cleared out the vertical constraints
25 and made the other changes, how would that affect -- I know you

1 weren't here during opening statement, but how would that
2 affect the -- let me give you a straight question here.

3 When you reference seated, the sit versus stand option,
4 does that necessarily indicate a difference in height, eye
5 height of the worker?

6 **A.** No. As you can see by this photograph, for this
7 particular situation the eye height of the workers is about the
8 same both sitting and standing.

9 **Q.** Does the seated option necessarily imply that the worker
10 is going to be much lower seated than standing?

11 **A.** Actually, it turns out that the small worker, the eye
12 height would be relatively comparable. For the tall worker,
13 their eye height will be lower.

14 **Q.** About how much, can you say?

15 **A.** It depends on what the height of the person would be.

16 **MR. MATTHEW RIGHETTI:** Okay. So that's 28-K we would
17 move into evidence, your Honor.

18 **THE COURT:** Received.

19 (Trial Exhibit 28-K received in evidence)

20 **MR. MATTHEW RIGHETTI:** And 28-J I have back up here.

21 (Document displayed.)

22 **MR. MATTHEW RIGHETTI:** We had not moved that into
23 evidence. We would move that into evidence as well.

24 **THE COURT:** Received.

25

1 (Trial Exhibit 28-J received in evidence)

2 **BY MR. MATTHEW RIGHETTI:**

3 **Q.** Now, we're still on the subject of modifications. You had
4 recommended the checkout station at Tulare, if you had to work
5 with the current --

6 **THE COURT:** That is such a bad picture. I just
7 cannot -- what is that?

8 Let me ask the witness. What is that? That's so blurry.
9 Does that make sense to you?

10 **THE WITNESS:** Well, that's a top view of the work
11 station. It is a very poor --

12 **BY MR. MATTHEW RIGHETTI:**

13 **Q.** Where did this come from, do you know?

14 **A.** This was a capture of one of the videos.

15 **Q.** Whose video?

16 **A.** I believe this one was Crandall.

17 **THE COURT:** Who?

18 **MR. MATTHEW RIGHETTI:** Robert Crandall was a defense
19 expert who took videotape from cameras in the ceiling.

20 **THE COURT:** All right. Go ahead.

21 **MR. WOHL:** Just for clarification, that was not at the
22 Tulare store.

23 **THE COURT:** Is that correct? It was some other store?

24 **MR. MATTHEW RIGHETTI:** Right. That's the Prescott,
25 Arizona store, correct.

1 **THE COURT:** All right. Go ahead.

2 **BY MR. MATTHEW RIGHETTI:**

3 **Q.** Was the physical set-up the same at Prescott as it was at
4 Tulare at the checkout stations?

5 **A.** According to the Crandall deposition or declaration, it
6 was. I have not visited the Prescott store.

7 **Q.** So this shows something in blue to the left.

8 **MR. MATTHEW RIGHETTI:** And we're going to mark this as
9 28-L.

10 (Trial Exhibit 28-L marked for identification.)

11 **BY MR. MATTHEW RIGHETTI:**

12 **Q.** What does the blue part on 28-L show you?

13 **A.** That's the bag, bagging counter.

14 **Q.** Is that where the bagging counter is currently located?

15 **A.** No.

16 **Q.** What does this picture -- did you create this picture?

17 **A.** Yes.

18 **Q.** And what is it designed to show?

19 **A.** It's illustrating that -- with a seated, but I also think
20 with a standing operation, that moving the bagging counter at
21 this position and putting the bags potentially here, I have
22 different alternatives. But these are only possibilities
23 because another thing is that there are Kmart stores that have
24 the circular carousel type of bag arrangement, like Walmart has
25 as well. So this is just one alternative.

1 But one thing would be to put the bags here. Move that
2 table closer. And the point of this is that you take things
3 off of the counter here, take it across the scanner and then
4 move it straight across here. You don't have to drop it down
5 to the bagging well, pick it back up again and put it onto
6 the...

7 Q. What is the bagging carousel that you say is in use at
8 some Kmart's and in use at some Walmarts?

9 A. I have just seen that in to some of the material provided
10 to me by counsel.

11 Q. What is it though? We're not all familiar with what a
12 bagging carousel is. Can you explain what it is and how it
13 works?

14 A. It's a circular rotating device with the bags coming off
15 here, and it rotates (indicating).

16 Q. From a functional standpoint, how does a cashier use a
17 rotating bagging carousel and why is that beneficial for a
18 seated cashier?

19 A. Well, what they would do is they would put items into
20 this, into the bags. Rotate that. The customer then takes the
21 bag off on the other side, puts it back in their basket.

22 The object is to make it so that the cashier does not have
23 to lift the bag up again, another 12 inches or whatever it
24 would be, up to the table. That reduces -- that would increase
25 the efficiency of it as well as reduce the effort.

1 Q. So 28-L you've used to demonstrate moving the bagging
2 station closer to the cashier and giving a couple of
3 alternatives for bagging?

4 A. Yes.

5 MR. MATTHEW RIGHETTI: Okay. We move 28-L into
6 evidence, your Honor.

7 THE COURT: Received.

8 (Trial Exhibit 28-L received in evidence.)

9 BY MR. MATTHEW RIGHETTI:

10 Q. Now 28-M, what is this? Did you create this?

11 A. Yes. This was just another concept. And, again, these
12 are just looking at some alternatives that might be considered.
13 These are not final designs of any sense. Would be to put the
14 bagging wells here, the bagging rack right here, so the person
15 would reach across and put it into here (indicating).

16 Right now where they are sticking out is over here
17 (indicating). They have got to kind of walk around and go at a
18 right angle to put things into the bags. And I find it
19 beneficial to have it oriented that way. That is just a
20 different alternative.

21 The object here is that when they fill the bags, they
22 would be able to take the bags off and leave them there for the
23 customer to pick up. What I'm trying to do is reduce the
24 requirement to lift the bag back up again after it's filled.

25

1 Q. This is 28-M. And when you look at 28-L and 28-M when you
2 drew this bagging station and moved it over to the -- closer to
3 the cashier, did you draw those to scale? Was that your
4 intention?

5 A. No, no. This was just to illustrate it. The size of this
6 bagging table is not correct. I was just -- that's not...

7 Q. So when you work with a corporate customer who is allowing
8 you access to their checkout counters and their workers, how
9 would you go about -- let's assume that Kmart hired you. How
10 would you go about making the modifications from an ergonomic
11 standpoint?

12 A. Well, I would go in and talk to them about what are the
13 constraints, the primary constraints. Sometimes I will end up
14 with constraints that when I discuss what the disadvantage of
15 it is, that the constraint goes away. The constraint was not
16 understanding what the problem was.

17 But I'll find out what the constraints are and then I'll
18 work with them to come up -- or I will come up with an
19 alternative design from my standpoint and then work with them
20 on modifying that.

21 Virtually all the time either the customer that I'm -- the
22 company that I'm working for or their suppliers can make
23 improvements to what I've suggested. The goal that I'm trying
24 to do is have them be able to accomplish what my objective is
25 by the design.

1 And so it's a sequential type of process. So you go
2 through a prototype. You tryout the prototype, see what works
3 and what doesn't work very well and move up to a final, final
4 design.

5 **Q.** Then once you have a final design, then it's ready to be
6 rolled out?

7 **A.** Yes. Then you go to the fabricators.

8 **MR. WOHL:** Objection, your Honor. There is a leading
9 tendency here --

10 **THE COURT:** Yes, that was leading. Sustained.

11 **MR. WOHL:** Thank you, your Honor.

12 **THE COURT:** Please do not lead the witness on
13 something that is in controversy.

14 Next question.

15 **MR. MATTHEW RIGHETTI:** We move 28-L and M into
16 evidence, your Honor.

17 **THE COURT:** L is already in.

18 M, any objection?

19 (No response.)

20 **THE COURT:** Hearing none, received.

21 (Trial Exhibit 28-M received in evidence)

22 **BY MR. MATTHEW RIGHETTI:**

23 **Q.** Putting on the projector 28-N, as in Nancy. What does
24 this photo demonstrate?

25 (Photograph displayed.)

1 **A.** This was just showing that there are POS's available on
2 the market today that are smaller and more comfortable that
3 could be used.

4 What I was assuming when I was looking at this originally
5 is would it be able to be done with the current equipment
6 possibly by changing some aspects of it, but with the current
7 equipment? And this in my report was just a discussion of the
8 fact that there is product on the market that could be
9 configured.

10 In fact, this is designed for a seated operator, as
11 opposed to "Do you sit or stand" after the design. They design
12 it for seated operation.

13 **Q.** This is a picture of Wilkinson -- oh, strike that.

14 What is this a picture of?

15 **A.** This is one of the pictures from Europe. I believe this
16 is from -- may I look at my report?

17 **THE COURT:** Sure.

18 **A.** I believe in is Wilkinson. I'm not sure.

19 **BY MR. MATTHEW RIGHETTI:**

20 **Q.** It's from Page 16 of your report.

21 **THE COURT:** In any event, it's from Europe somewhere
22 or maybe England, right?

23 **THE WITNESS:** Yes.

24 **MR. MATTHEW RIGHETTI:** Move 28-N into evidence.

25 **THE COURT:** Received.

1 (Trial Exhibit 28-N received in evidence)

2 **BY MR. MATTHEW RIGHETTI:**

3 **Q.** And 28-O, what does that picture show?

4 (Photograph displayed.)

5 **A.** I was just showing some alternative designs. One of the
6 things that occurs today is in the cash register, that the cash
7 drawer comes out quite a ways. And that is a constraint for
8 both standing and for sitting.

9 And so I was showing an alternative design for that. The
10 keyboard is on top. This part here is a keyboard in this
11 particular situation.

12 **Q.** And the drawer, the cash is kept where?

13 **A.** The cash is underneath. So when you -- when you pop it
14 up, then the cash -- this comes up and the cash is accessible
15 here.

16 **MR. MATTHEW RIGHETTI:** Move 28-O into evidence.

17 **THE COURT:** Received.

18 (Trial Exhibit 28-O received in evidence)

19 **BY MR. MATTHEW RIGHETTI:**

20 **Q.** And 28-P, as in Peter, what does this depict?

21 (Photograph displayed.)

22 **A.** This one was either at -- I think this was at Asta, but
23 it's in England. And this is another alternative. This is the
24 type they have at Aldi at this point where it's between the
25 person and the scanner. And the object, again, here is to have

1 the cashier always looking at the customer as part of the
2 friendly concept. But the cash drawer is here and it pops up
3 right in front of the person, as opposed to being over on the
4 right-hand side.

5 So I'm just showing that there are alternative approaches
6 to cash drawer positions that can be very consistent with a
7 seated operation.

8 Q. Well, at the current Kmart in Tulare, does the cashier
9 take their eye off of the customer?

10 A. Yes. They turn to the side.

11 Q. And with this configuration, 28-P, how is that different?

12 A. You would always be facing the customer. You would never
13 have to twist. You would just stay in one direction.

14 Q. Okay.

15 THE COURT: Are you moving 28-P?

16 MR. MATTHEW RIGHETTI: I am moving 28-P.

17 THE COURT: Any objection?

18 A. Aldi also uses this same configuration in their U.S.
19 stores.

20 THE COURT: Received in evidence.

21 (Trial Exhibit 28-P received in evidence)

22 THE COURT: Next. Please continue.

23 How much do you have of direct?

24 MR. MATTHEW RIGHETTI: Maybe five minutes or less.

25 THE COURT: Let's finish up your direct and we'll take

1 a break at that point.

2 **BY MR. MATTHEW RIGHETTI:**

3 **Q.** Now, when you did your evaluation of the Kmart cashiers in
4 Tulare, did you consider activities that occur away from the
5 checkout station?

6 **A.** No, I did not.

7 **Q.** Do you know what activities occur outside of the checkout
8 station for cashiers at Tulare?

9 **A.** Just from the job description that I read that talked
10 about restocking and the various things.

11 **Q.** Is it your opinion that the cashier should be seated while
12 they are stocking shelves?

13 **A.** No.

14 **Q.** If they are stocking shelves?

15 **A.** No.

16 **Q.** Or when they are getting shopping carts out in the parking
17 lot?

18 **A.** No.

19 **Q.** Is it -- is the fact that a cashier may have to at times
20 come out of the cash register station -- strike that.

21 The modifications that you have suggested for the Tulare
22 station, are they -- is it your opinion that a cashier can do
23 100 percent of the cashier work that comes through their aisle
24 from a seated position?

25 **A.** No, no.

1 Q. Okay. So tell me the types of things that you would
2 envision a cashier at Tulare doing at the cash register station
3 with the modifications that would still need to be handled from
4 a non-seated position?

5 A. Primarily moving heavy or awkward objects by -- things
6 that are coming that are -- you don't want to have someone
7 lifting in a seated posture heavy objects. They can lift quite
8 a bit, but not heavy objects. So --

9 Q. And so what were -- I'm sorry.

10 A. So if something came in, a tent or something, that, in
11 fact, my expectation is they would stand to do that.

12 Now, to a great extent with the bagging counter changed to
13 where I've put it, even heavier and more awkward items can more
14 easily be taken across the scanner and just put right on the
15 thing much more easily.

16 The way it is now where you have to take steps to go from
17 the scanning area over to the bagging counter, that makes it
18 much more difficult. So that would be one of the things that
19 would help, both for a standing operating and a sitting
20 operator.

21 Q. Is the fact that there are heavier or bulkier items sold
22 at Kmart a justification in your view not to provide seats to
23 cashiers?

24 A. No. They would simply stand to handle those.

25 Q. And when you have the -- you were referencing a far reach

1 area for the cashier which would be minimized some by cutting
2 off the lip of the cash register station, could you envision
3 cashiers from a seated position reaching out to that far
4 corner?

5 **A.** Yes. What the cashier would do would rotate a bit and
6 literally stand on their right -- stand up on their right leg
7 and get it in and come back down again.

8 **Q.** Is that some -- from an ergonomics perspective is that a
9 hazard?

10 **A.** Not if it's not a repetitive operation.

11 **Q.** When we talk about heavy and bulky items, is there a
12 universal understanding of that that would apply to all
13 cashiers?

14 I mean, for instance, for the 4-foot-11 cashier, would the
15 same thing be bulky and heavy as compared to the 6-foot-4
16 cashier?

17 **A.** No. Different people have different capabilities.

18 **Q.** How in the world do they figure out -- do cashiers figure
19 out what's heavy and bulky and what would require standing and
20 what could be done seated?

21 **MR. WOHL:** Objection, your Honor. Calls for
22 speculation. Lacks foundation.

23 **THE COURT:** Overruled. Please answer.

24 **A.** Their muscular system works out pretty well. Your body
25 tells you what your -- what happens is, and the body is set up

1 pretty well to actually restrict how much you can lift to the
2 point where you don't damage yourself. I think that's what
3 you're asking.

4 **BY MR. MATTHEW RIGHETTI:**

5 **Q.** Do you understand that employers train employees to reduce
6 injuries on how to lift and how to handle merchandise?

7 **A.** Yes.

8 **MR. WOHL:** Objection, your Honor. Leading.

9 **THE COURT:** That is leading. Sustained. That answer
10 is stricken.

11 On something that could be in controversy, do not lead
12 your witness. If it's preliminary to something, it's okay to
13 lead. But if it is in controversy, you may not ask a leading
14 question.

15 **MR. MATTHEW RIGHETTI:** Yes. I'm getting the hang of
16 it.

17 **BY MR. MATTHEW RIGHETTI:**

18 **Q.** What type of recommendations, if any, would you make in
19 terms of training cashiers at Kmart to do their work at the
20 cash register station from a seated position -- or a sit/stand
21 position, I would say?

22 **A.** Well, what you do, you do train them, if you will, to push
23 items as opposed to lift items, although they naturally do
24 that, but just to encourage that as well.

25 Another area that we have problems with checkout is people

1 rotating the things when they don't need to. That causes some
2 wrist injuries from an ergonomic standpoint. Doesn't have
3 anything to do with sitting or standing, but there are other
4 parts of training that you would do in that situation.

5 **Q.** In the event a sit/stand option was introduced to Kmart,
6 do you have an opinion about what the -- whether that would be
7 beneficial to Kmart cashiers?

8 **A.** I think it would be beneficial to both Kmart cashiers and
9 to Kmart. I think in the long run their efficiency would go
10 up. Their absenteeism would go down. Their turnover rate
11 would go down. I think it would be beneficial across the
12 board.

13 **MR. MATTHEW RIGHETTI:** We have nothing further, your
14 Honor.

15 **THE COURT:** All right. The witness is now on
16 cross-examination. So the rule against consulting with the
17 witness while he's on cross-examination will apply.

18 So is it Dr. Johnson?

19 **THE WITNESS:** Yes.

20 **THE COURT:** All right. So, please, no talking with
21 any counsel while on cross. We'll take a 15-minute break at
22 this time.

23 While we're on break I'm going to hand down to Dawn my
24 list of what's in evidence. I'm going to ask the lawyers to
25 look at it.

1 I want to say, Mr. Righetti, you referred after the fact
2 to some of these exhibits by what I think is the wrong exhibit
3 number. This is a product of you not having marked these
4 properly to begin with. You need to get with Dawn and the
5 other lawyers and make sure that every exhibit is properly
6 marked before we resume. I want them marked. I do not want
7 this to slide. It will turn into a mess.

8 **MR. MATTHEW RIGHETTI:** I understand and apologize for
9 the confusion.

10 **THE COURT:** Do it within the next 15 minute, please.
11 Thank you.

12 (Whereupon there was a recess in the proceedings
13 from 11:22 a.m. until 11:39 a.m.)

14 **THE COURT:** All right. My clerk is not here. Is my
15 court reporter ready?

16 **THE REPORTER:** Yes, I'm ready, Judge.

17 **THE COURT:** Have you straightened out the exhibits?

18 **MR. DOSTART:** We're doing that right now, your Honor.

19 **THE COURT:** Can I have my notepad back? I need it to
20 do my work.

21 (Notepad was tendered to the Court.)

22 **THE COURT:** Are we ready, Mr. Wohl?

23 **MR. WOHL:** We certainly are, your Honor.

24 **THE COURT:** All right. You may proceed.

25 **MR. WOHL:** Thank you very much.

CROSS EXAMINATION

BY MR. WOHL:

Q. Good morning, Dr. Johnson.

A. Good morning.

Q. Nice to see you again.

Dr. Johnson, would you say it's fair to say that ergonomics is concerned with prompting both the productivity of the employee as well as the employee's well-being?

A. Yes.

Q. So it's a balance between the two, correct?

A. To try and improve both.

Q. And perhaps in a perfect world the employee could be the most productive possible and the most well off as possible, but in a real world it doesn't quite work that way; isn't that correct?

A. The vast majority of my cases by the time we end up with having it ergonomically designed for the operator, it's also faster and better quality.

Q. Are you denying that there are cases in which productivity is, in fact, somewhat impaired because of considerations given to the employee's well-being?

A. In my 40 years productivity has never declined at the end of my effort.

Q. Or conversely the other way; that the employer, to obtain a certain left level of productivity, has had to settle for

1 something less than optimal well-being for the employee?

2 **A.** I'm not understanding what you're saying there.

3 **Q.** That because of the demands of the job the way the work
4 station is configured, it serves productivity perhaps somewhat
5 at the expense of employee well-being; that that's the solution
6 that's reached by the ergonomist in consultation with the
7 employer?

8 **THE COURT:** I'm not sure -- I don't really understand
9 the question myself. I understood your first version, but I
10 don't understand this version. So try it again in different
11 words.

12 **MR. WOHL:** I certainly will, your Honor.

13 **BY MR. WOHL:**

14 **Q.** Isn't it true, Dr. Johnson, that sometimes because of the
15 employer's demand for a certain level of productivity, the
16 ergonomist has to come up with a solution that is not
17 necessarily optimal for the employee's well-being?

18 **A.** There are constraints that I've dealt with that constrain
19 what you can do from an ergonomic point, but productivity has
20 not been one in my experience.

21 **Q.** Don't you agree that there are some jobs that require
22 standing?

23 **A.** Some jobs? What do you mean by "job"?

24 **Q.** I'm sorry. You don't know what a job is?

25 **A.** There are many different -- are you talking about an

1 entire job -- are you talking about a task or are you talking
2 about a task element or are you talking about a job?

3 Q. Well, let's start with a job. Aren't there some jobs that
4 require standing?

5 A. Some jobs have tasks that would require standing, yes.

6 Q. Even though in performing those jobs and in standing, it
7 may not be optimal for the employee's well-being?

8 A. Say that again.

9 Q. In performing the task that requires standing, it may not
10 be optimal for the employee's well-being?

11 A. That's the second part of it --

12 **THE COURT:** Here is what I think counsel is asking.
13 Let me try it. That is: Assume that you have a job. And by
14 "job" I mean the overall job, not just one task. And let's
15 assume that that job has got a bunch of tasks or one task and
16 everyone agrees that you've got to stand to do that job.

17 All right? So counsel is asking you whether or not it
18 would be true that in order to perform that job the guy or
19 woman has got to stand the whole time even though standing the
20 whole time is not necessarily in the best interests of that
21 employee's health. Agreed?

22 **THE WITNESS:** Yes. There are some jobs that require
23 and have constraints that require a long-term standing
24 position, yes.

25 **THE COURT:** No. And that it would be not necessarily

1 in the employee's best health interests. That's the part he's
2 after. Do you agree with that or not?

3 **THE WITNESS:** If it is long-term standing, that would
4 not be in their interest. I agree.

5 **THE COURT:** All right. Is that the point you were
6 trying to get at?

7 **MR. WOHL:** Yes. The job, however, in that situation
8 requires it.

9 **BY MR. WOHL:**

10 **Q.** Okay. As an ergonomist, you're being hired to design work
11 spaces to be safer and more efficient, correct?

12 **A.** Yes. Those are two of the goals.

13 **Q.** But even if the employer follows your recommendations, you
14 can't guarantee that there will be never any jury to the
15 employee resulting from performing the job, correct?

16 **THE COURT:** You have so many words here going by so
17 fast. Say that again more slowly so I can understand it.

18 **MR. WOHL:** I'm sorry. I will break it down, your
19 Honor. I apologize.

20 **BY MR. WOHL:**

21 **Q.** If an employer followed your recommendations for what you
22 believe to be a safer, more efficient workplace, you can't
23 guarantee that nevertheless the employee might still suffer
24 from sort of injury, correct?

25 **A.** Injury due to the job you're talking about?

1 Q. In performance of the job, that's right.

2 A. There would be no guarantees. If you're saying -- as a
3 result of my design, that my design caused the jury?

4 Q. Or notwithstanding your design. Notwithstanding your
5 design, as an ergonomist, you can't promise the employer if the
6 employee uses this design, he will never be injured on the job,
7 correct?

8 A. I would never say never.

9 THE COURT: Promise. Guarantee. I mean, who in the
10 world would make such promises or guarantees? That doesn't
11 prove very much, Mr. Wohl. That's too argumentative for my
12 taste.

13 MR. WOHL: All right.

14 THE COURT: There are ways to get at the point you're
15 making without being so argumentative.

16 MR. WOHL: Okay. I don't mean to be argumentative,
17 your Honor. I just want to draw out these facts.

18 BY MR. WOHL:

19 Q. Isn't it also true that when you approach a work space as
20 an ergonomist being asked to possibly redesign it, you're
21 trying to design it to match the demands of the job in an
22 ergonomically efficient way, correct?

23 A. What do you define as an "ergonomically efficient way"?

24 Q. That's not a meaningful phrase to you, "ergonomically
25 efficient way"?

1 A. No.

2 Q. A way that satisfies the goals of ergonomics, which is to
3 the extent possible improving both productivity and employee
4 well-being.

5 A. Okay. So let's say that productivity and well-being. Ask
6 your question again.

7 Q. When you're asked to design or modify a workplace, that is
8 the goal that you're trying to achieve, correct?

9 A. Increase productivity, increase quality of work life,
10 increase quality of the product and decrease the potential for
11 occupational safety and health.

12 Q. What you're not charged with doing is changing the demands
13 of the job, isn't that correct?

14 A. What I'm not charged with doing is changing the demands of
15 the job.

16 Q. Right.

17 A. When you're saying "the demands of the job," can you give
18 me an example of what you mean by that?

19 Q. What the employer wants the employee to accomplish in the
20 job. I want the employee to perform the following job
21 functions.

22 Your job is not to say: Well, let's change those job
23 functions. Let's not have the employee do certain things.

24 It's, how do we best enable the employee to perform those
25 job functions, isn't that correct?

1 A. That is correct. And to inform the employer of what the
2 disadvantage of having that particular definition is for them.

3 Q. But is the --

4 A. From an ergonomic standpoint.

5 Q. But it is the employer's prerogative if he wants the job
6 performed that way, he's entitled to have the job performed
7 that way, correct?

8 A. They hired me, yes.

9 Q. Isn't it also true then coming up with an ergonomic
10 solution, there are trade-offs that you must make in coming up
11 with a recommendation?

12 A. There are always -- with respect to what? I mean, there
13 are -- as a general statement, there are trade-offs.

14 Q. Yes. In other words, there are no absolute answers here.
15 It's always a matter of balancing different considerations,
16 isn't that correct?

17 A. What -- can you give me an example of what considerations
18 are? I'm not sure I'm...

19 Q. Well, for example, what might be best for one worker might
20 not be best for another worker, correct?

21 A. Usually you don't run into that that much.

22 Q. Well, you've already said that you strive to satisfy the
23 fifth percentile and the 95th percentile. So within that group
24 the ergonomic solution may work, but it may leave out those at
25 either extreme, correct?

1 A. If you recall, I said that I don't stick to the fifth and
2 95th. That's up to the company to decide what percentile they
3 would accommodate.

4 Q. But you're facilitating that choice by the employer,
5 correct, in coming up with your solution?

6 A. I'm telling the employer what the advantages and
7 disadvantages are of accommodating a greater or lesser number
8 of people.

9 Q. But in coming up with your solution, you have to take into
10 account what range of employees the employer wants to be able
11 to help?

12 A. Yes, yes. But that's the employer's decision, yes.

13 Q. It's also possible that a solution for one company may not
14 be the right solution for another company, isn't that correct?

15 MR. MATTHEW RIGHETTI: Object to vague and ambiguous.

16 THE COURT: Overruled.

17 A. The identical situation?

18 BY MR. WOHL:

19 Q. Yes.

20 A. I don't know what would be different between -- I mean,
21 without knowing what the differences are.

22 Q. Company values, would that play a role?

23 A. In terms of --

24 Q. What the company values as being important in the
25 performance of the job, would that come into play?

1 A. Are you talking about from an ergonomics standpoint?

2 Q. From the business perspective.

3 A. I'm not representing a business perspective. I'm
4 representing an ergonomist.

5 Q. So you're not getting into that part of it. That's up to
6 the employer to decide?

7 A. Yes. That would not be -- that's not my domain.

8 Q. And isn't it correct that in your experience consulting,
9 you have encountered numerous different situations and, as a
10 result, helped design different work stations?

11 A. Say it one more time.

12 Q. In your consulting practice have you not encountered
13 different work situations; that is, different -- both
14 configuration and what the business is and so forth. You've
15 counted different types of situation is in that regard, isn't
16 that correct?

17 A. Yes.

18 Q. And you have come up with different work solutions,
19 different ergonomic solutions to match those differences, isn't
20 that correct?

21 A. Yes. I don't -- when you're saying "differences," to
22 match what they are requirements are. I'm not sure what --
23 when you say "differences," you're saying A versus B and I
24 don't know what the A and B are in the case that we're talking
25 about.

1 Q. Ergonomics is not a one size fits all type of practice,
2 isn't that correct?

3 A. I don't know what this statement means.

4 Q. That you cannot impose the same solution in every
5 workplace irregardless -- regardless of these other
6 considerations; what the business is, what the company values
7 are and so forth?

8 A. The principles that we use in ergonomics, I would contend,
9 in terms of motion, economy and these types of things can be
10 equally applied in each situation.

11 Q. Jobs have different physical requirements, don't they?

12 A. Yes.

13 Q. And you have to tailor your solution with respect to that,
14 is that correct?

15 A. That's what we're looking at, is the requirements.

16 Q. And at times you have found that the physical demands of a
17 particular job did not allow use of a seat, isn't that correct?

18 A. Yes, yes. There are --

19 Q. For example, you did work with a chicken processing
20 facility, correct?

21 A. I've done a lot of work with chicken processing
22 facilities, yes.

23 Q. And at the facility one of the functions that the employee
24 had to perform was a so-called live hang function?

25 A. Yes.

1 Q. That's where the bird is suspended from some sort of hook?

2 A. That's where they are putting it on the hook, shackles.

3 Q. Without getting, I think, too graphic about that whole
4 process, in that regard you did not --

5 THE COURT: That would be Livingston, not Tulare. If
6 you know the Central Valley.

7 MR. WOHL: That's true, your Honor. That's very true.
8 Thank you.

9 BY MR. WOHL:

10 Q. It's correct in that instance you did not recommend that a
11 lean stool or seat be used for the employees, correct?

12 A. Correct.

13 Q. Is that correct, that when you're hired to conduct an
14 ergonomic analysis, you consider the actual job the employee is
15 required to do as opposed to a hypothetical job that could be
16 performed differently?

17 A. No. I look at what -- I don't restrict it to how they do
18 the job now or I would not make very many recommendations.

19 Q. You are looking at the actual job they are performing,
20 isn't that correct?

21 A. No. I'm looking at how to change the job they are
22 performing to make it more productive and better for the
23 people.

24 Q. I'm sorry. Change the job they are performing or job the
25 way in which they are performing the job?

1 A. I'm having trouble with the definition between those two.

2 Q. Do you not see the difference between those two?

3 A. I am not. Are you talking about the output? What are you
4 defining by the job?

5 Q. The actual work that the employee is doing. The actual
6 value that he is delivering to the employer, you're not looking
7 to change that?

8 A. I'm trying to improve that.

9 Q. Through what you believe to be a more efficient process,
10 correct?

11 A. And lowering absenteeism and turnover, yes.

12 Q. And you generally consider the expectations the employer
13 has about the job, isn't it true?

14 A. I'm not sure how that, how much I would -- I don't know
15 how that plays that much of a part. When you're saying --
16 expectations with respect to what?

17 Q. The employer's expectations as to the --

18 A. Employer's expectations?

19 Q. Yes, sir.

20 Is it not true that you generally consider the employer's
21 expectations about the job when you come up with your ergonomic
22 analysis and recommendation?

23 A. Yes. There are constraints that the employer imposes.

24 Q. And you also have to know for whom the employer has
25 designed the work station, isn't that right?

1 A. Who the operators are, yes.

2 Q. I think you said before you would need to know from the
3 employer what range of employees by whatever might be a
4 relevant consideration the employer wants to accommodate or fit
5 in order so that you can make your recommendation meaningful
6 for the employer, correct?

7 A. Well, I would tell them what the advantage and
8 disadvantage of choosing to exclude or include -- to
9 accommodate people, yes.

10 Q. Dr. Johnson, isn't it true that there's different types of
11 ergonomics?

12 A. Could you elaborate on that?

13 Q. Specifically aren't there two categories of ergonomics,
14 cognitive ergonomics and physical ergonomics?

15 A. They're -- to an extent they are in the same area. When I
16 teach a course, I teach content both ways.

17 Q. Well --

18 A. But they are --

19 Q. My question is: Isn't it true there is recognized in the
20 field two separate categories of ergonomics; one is considered
21 cognitive and one is considered physical?

22 A. You're making them two totally different categories and
23 they are not. They overlap significantly. Most everyone that
24 works in physical also works a little bit in cognitive and
25 vice-versa.

1 Q. Do you recall giving a deposition in a case called *Hall*
2 *versus Rite Aid Corporation*?

3 A. Yes.

4 Q. Do you recall in that deposition I asked you if there were
5 different types of ergonomics?

6 A. Yes.

7 Q. And you told me that generally --

8 THE COURT: No, no. You've got to read it exactly.

9 MR. WOHL: All right. Your Honor, I will do that.

10 THE COURT: Give us page and line number.

11 MR. WOHL: Would you like a copy of the deposition,
12 your Honor?

13 THE COURT: I would but, no, I don't want to hold you
14 up on this. You go ahead and I will trust you to read it
15 correctly.

16 MR. WOHL: Your Honor, I'm reading from Dr. Johnson's
17 deposition, again, in the *Hall versus Rite Aid Corporation* case
18 pending in San Diego Superior Court. This deposition was taken
19 on January 27, 2012. I am reading starting on Page 28, Line 24
20 and continuing until Page 29, Line 2.

21 THE COURT: All right. Just read the entirety of the
22 question and the entirety of the answer.

23 MR. WOHL: I will, your Honor.

24 BY MR. WOHL:

25 Q. (As read)

1 **"QUESTION:** Okay. Are there different types of
2 ergonomics?

3 **"ANSWER:** There are two general categories that people
4 consider sometimes, and one is cognitive ergonomics
5 and the other is physical ergonomics."

6 That was your testimony; correct, sir?

7 **A.** Yes.

8 **Q.** Would you care to tell the Court what the difference is
9 between cognitive and physical ergonomics?

10 **A.** Cognitive ergonomics have to do with the psychological
11 component of it. And physical ergonomics have to do with the
12 physio, physiological aspect of it more so.

13 **Q.** So more specifically would it be fair to say that in terms
14 of cognitive ergonomics, you're dealing with the mental
15 processes and capacities of humans when at work?

16 **A.** The -- yes. And then the perception and sensation and not
17 just the cognitive, yes.

18 **Q.** And issues that would be considered in that field would
19 include mental strain from workload?

20 **A.** Yes, but physical ergonomists include that as well.

21 **Q.** I'm just asking about cognitive, sir. So just answer my
22 question, please.

23 **A.** Okay.

24 **Q.** It would also include decision making?

25 **A.** People in ergonomics, some areas of ergonomics consider

1 decision making, yes.

2 Q. Human error?

3 A. Yes.

4 Q. And training?

5 A. Again, you're not separating that into only cognitive
6 ergonomics at this point, is that correct?

7 Q. I'm simply asking you if those are areas that cognitive
8 ergonomics encompasses.

9 A. Those are some of the areas that some cognitive
10 ergonomists work in.

11 Q. Physical ergonomics deals with the human body's responses
12 to physical and physiological workloads, isn't that correct?

13 A. That's a reasonable definition.

14 Q. Physical ergonomics deals with such issues as repetitive
15 strain injuries from repetition?

16 A. That's one of the areas that it deals with, yes.

17 Q. Vibration?

18 A. Any -- any stressor, yes.

19 Q. Force?

20 A. When you're saying "force" -- I mean, yes.

21 Q. The impact of force on the human body?

22 A. Yes.

23 Q. Isn't that not part of it?

24 A. Yes.

25 Q. And posture?

1 A. Yes.

2 Q. Now, do you contend that you're an expert in both
3 categories of ergonomics?

4 A. I have done work in both and have written in both areas,
5 yes.

6 Q. You would agree, would you not, that to the extent
7 ergonomics plays a role in this case, we're concerned with
8 physical ergonomics?

9 A. No. There is the cognitive aspect everybody it as well.

10 Q. So you --

11 A. From the standpoint -- I'm sorry.

12 Q. Excuse me. I think I cut you off.

13 A. When you're looking at location of displays or this type
14 of thing, then you've got to make sure they are readable,
15 readable from the distance and that type of thing. So there
16 are cognitive aspects that play a part, like I say, with
17 physical. They are not totally separate issues in many
18 respects.

19 Q. Do you think the physical ergonomics are the predominant
20 issue though?

21 A. I wouldn't say that's true.

22 Q. Now -- and, again, you do consider yourself to be an
23 expert in physical ergonomics as well, is that correct?

24 A. I have worked in physical ergonomics my life, yes.

25 Q. Isn't that correct, Dr. Johnson, that you have not

1 published anything on physical ergonomics in a peer-reviewed
2 journal since 1998?

3 A. That's very -- that's possible.

4 Q. Isn't it true that you have not published anything related
5 to physical ergonomics in a peer-reviewed proceeding since
6 2005?

7 A. That's possible.

8 Q. Isn't it true that the focus of your work, or at least
9 your academic work has been in the area of cognitive
10 ergonomics?

11 A. My academic work, my research work?

12 Q. Yes.

13 A. My research work has been -- in fact, I wouldn't even call
14 it cognitive. It's in safety, truck safety. But I wouldn't --

15 Q. Cognitive ergonomics in terms of how it plays with truck
16 safety; is that what you mean, sir?

17 A. Yes, yes.

18 Q. Is it also true that you did not study ergonomics or
19 industrial engineering as an undergraduate student?

20 A. I have courses in ergonomics as an undergraduate student,
21 but my degree was in psychology. I only had a couple of
22 courses in ergonomics. It was not a major.

23 Q. Isn't it true that you did not obtain a Master's degree
24 in industrial engineering or design?

25 A. It was in industrial -- it was in engineering psychology,

1 which was an interdisciplinary program; but it was in a
2 psychology program, yes.

3 Q. Not in industrial engineering?

4 A. Not in industrial engineering.

5 Q. Isn't it true that you have never taken course work in
6 structural engineering?

7 A. No, that's not true.

8 Q. You sure that's not true?

9 A. After I had my PhD, I went back and sat in on classes that
10 had statics, dynamics, thermomechanics, materials to get ready
11 for the professional engineering exam.

12 MR. WOHL: I'm going to, your Honor, pull from Dr.
13 Johnson's deposition taken in this case and I'm going to read
14 from Volume 1, Page 35, Lines 18 to 21.

15 BY MR. WOHL:

16 Q. So first off, Dr. Johnson, let me just lay the foundation.

17 Is it correct you gave a deposition in this case on April
18 4, 2012?

19 A. Yes.

20 Q. And reading from page 35, line 18-21:

21 "QUESTION: In accordance with obtaining your Ph.D. in
22 industrial engineering, did you take course work in
23 structural engineering?

24 "ANSWER: No."

25 A. That's correct. I did not -- I had my Ph.D. already, when

1 I took those courses.

2 Q. Isn't it true that the first degree you obtained in
3 industrial engineering was, in fact, your Ph.D. program?

4 A. Yes.

5 Q. And that was the first time you completed any course work
6 in industrial engineering?

7 A. Yes.

8 Q. So --

9 A. When -- you're saying for my Ph.D. was the first.

10 Q. Right.

11 A. Yes.

12 Q. Correct. So, in summary, you did not study physical
13 ergonomics at all until you began your Ph.D. program; isn't
14 that correct?

15 A. That's correct.

16 Q. Now, have you ever been designated, meaning a counsel has
17 designated you as an expert in ergonomics before in connection
18 with litigation? I'll restate that question.

19 In connection with litigation, have you ever been
20 designated by counsel, that is counsel declaring you to be an
21 expert in ergonomics?

22 A. I believe, if I'm understanding it -- I'm not sure I
23 understand the legal aspects, but I believe in the Auto Zone
24 case there was an Auto Zone case where there was a deposition
25 taken.

1 Q. Did the *Auto Zone* case have to do with the issue of
2 seats --

3 A. No.

4 Q. -- as presented in this case?

5 Perhaps you remember from our deposition we both talk
6 fast, but we both have to be quiet until the other guy talks or
7 else the record is a mess.

8 *Jones vs. Auto Zone* was not a seats case, correct?

9 A. Correct.

10 Q. Were there any other cases which are seats cases in which
11 you were designated as an expert?

12 A. Recently, yes, the *CVS*, *Target*, *Rite Aid*.

13 Q. May I help you with *Home Depot*?

14 A. Yes, *Home Depot*.

15 Q. Okay. That's five cases plus this case, correct?

16 A. Yes.

17 Q. And in each and every one of those cases, the counsel that
18 designated you as an ergonomics expert are the folks sitting at
19 plaintiff's counsel table here today, correct?

20 A. That's correct.

21 Q. Is it correct that in the *Kilby vs. CVS* case, you gave an
22 expert report?

23 A. Yes.

24 Q. And your report recommended that seats could be provided
25 to cashiers who currently stood; is that correct?

1 A. That providing seats for those cashiers would be
2 beneficial, yes.

3 Q. Isn't it true that your testimony was partially stricken
4 in the *Kilby* case?

5 A. I don't know about that.

6 Q. Isn't it correct that the court in the *Kilby* case struck
7 your testimony because -- regarding modifications necessary to
8 the provision of seats because the Court founds it could not be
9 supported by facts or data?

10 A. I don't know about that.

11 Q. If I showed you a copy of that order, would that refresh
12 your memory?

13 A. No. I mean, I -- I'm not sure what that means, struck
14 my -- I'm not sure what that means.

15 Q. Okay. So even if I showed you the order, you wouldn't
16 know if that was the --

17 A. I would look at it, but I'm not sure I would understand.

18 Q. I would be happy to show it to you.

19 A. Yes, please.

20 MR. WOHL: Your Honor, with your permission, I would
21 like to show the witness a copy of the Court's order in *Kilby*
22 *vs. CVS Pharmacy* -- that's the Southern District of
23 California -- in part affirming tentative rulings, denying --

24 THE COURT: Okay.

25 MR. WOHL: I didn't know how much formality you

1 wanted.

2 **THE COURT:** Show it to the witness and see if his
3 memory is refreshed.

4 **MR. MATTHEW RIGHETTI:** Your Honor, I don't think it's
5 been established that he has ever seen it.

6 **THE COURT:** He doesn't have to have seen it in order
7 to refresh his memory. Anything can be used to refresh memory.

8 Irving Younger used to say your favorite song or the scent
9 of a perfume, or anything might refresh memory.

10 There is no requirement that the document have been seen
11 by the witness before. However, the witness never actually
12 said that seeing the document would refresh his memory. He
13 only said he would be willing to look at it. But we're going
14 to pass that defect for now.

15 Can you answer the question from memory whether or not
16 your testimony was stricken?

17 **THE WITNESS:** From memory, I cannot. From this
18 document, it appears that it has.

19 **THE COURT:** Well, that doesn't -- all right. That
20 doesn't count. We're dealing with the witness and his memory.
21 If you want to show and impeach him in some other way that some
22 other judge struck his testimony, more power to you. But this
23 is not refreshing memory.

24 **MR. WOHL:** All right, your Honor. That's fine. I
25 think I've made my point.

1 BY MR. WOHL:

2 Q. Now, it's correct, is it not, that apart from your
3 litigation practice that you've told us something about, you
4 also do consult with companies in a non-litigation context
5 about workplace ergonomics, correct?

6 A. Yes.

7 Q. And one of those companies was Brookshire Grocery,
8 correct?

9 A. Yes.

10 Q. And at Brookshire, you looked at specifically cashier
11 positions; did you not?

12 A. No. At Brookshire there was a little bit of looking at
13 the cashier, but the primary thing was in their cooked area.
14 Cooked foods area.

15 MR. WOHL: Your Honor, another deposition. This time
16 I'm going to read from the deposition that Dr. Johnson gave in
17 a case called *Brown and Williamson* -- apparently not the
18 tobacco company, or whatever they do -- vs. *Wal-Mart Stores*.
19 And this was a case pending in this court. And the deposition
20 of Dr. Johnson was taken on April 13, 2011, in Fayetteville,
21 Arkansas.

22 BY MR. WOHL:

23 Q. Do you recall testifying in that deposition?

24 A. Yes.

25 THE COURT: Give us page and line. Say "question,"

1 read the question. Say "answer," read the complete answer.

2 MR. WOHL: Your Honor, I'm reading from page 23. I'm
3 starting at line 15, and continuing to line 25.

4 "QUESTION: And what kind of --

5 "ANSWER: As I remember --

6 "QUESTION: -- work did you do for Brookshire Grocery?

7 "ANSWER: We were looking particularly at
8 musculoskeletal disorder problems within the
9 facility. So the cashier was one of the locations."

10 Goes on to say:

11 "We also looked at the bakery and other aspects of the
12 facility, as well. But it was -- it was specifically
13 looking for musculoskeletal things -- aspects of the
14 workstation design that were potentially increasing
15 the risk of musculoskeletal disorders."

16 BY MR. WOHL:

17 Q. Correct?

18 A. I stand by that.

19 Q. And that did include specifically looking at the cashier
20 position at Brookshire?

21 A. No, wait. Specifically was -- no, but I did look at the
22 cashier workstation relative to musculoskeletal disorder of the
23 upper extremity in particular. But the focus was on -- on the
24 bakery or the baked goods.

25 Q. Well, with regard --

1 A. I don't see that that statement is inconsistent with what
2 I said today.

3 Q. With respect to the cashier workstation, is it correct
4 that you made some recommendations about changes to procedures
5 and workstation design that could be used to reduce the risk of
6 many MSDs -- MSD, musculoskeletal disorders, correct?

7 A. With respect to the cashier workstations --

8 Q. Yes.

9 A. -- at Brookshire?

10 Q. Yes.

11 A. I don't --

12 Q. Did you not do that?

13 A. -- recall that I did.

14 MR. WOHL: Reading again from the deposition, your
15 Honor, page 24, starting at line 1, and continuing to line 5:

16 "And what were your conclusions with respect to the
17 cashier position for Brookshire Grocery?

18 "ANSWER: We recommended some changes in -- in both --
19 in some of the procedures that they were using, as
20 well as -- as workstation changes."

21 BY MR. WOHL:

22 Q. That is your testimony, correct?

23 A. The procedures they were using were -- were the twisting
24 of the -- I know what the procedures were.

25 Q. But you went on to say workstation designs -- workstation

1 changes. So you also looked at work -- cashier workstation --

2 **A.** Is it cashier workstations?

3 **MR. MATTHEW RIGHETTI:** Your Honor, he misquoted the
4 impeachment.

5 **THE COURT:** Do this. Show the witness the document so
6 that he can see it in print.

7 **MR. WOHL:** Of course, your Honor.

8 **THE COURT:** And then maybe -- then give us your
9 statement you were about to make.

10 **MR. WOHL:** Okay.

11 **THE COURT:** The witness will. And then counsel can
12 ask a fresh question.

13 **THE WITNESS:** Yes. This does say with respect to
14 cashier position. But the recommendations we made, I was going
15 further with the recommendations for the workstation were
16 actually with respect to the cooking area. But the procedures
17 area were relative to the cashier. And that was to stop them
18 from twisting the items as much.

19 **BY MR. WOHL:**

20 **Q.** Dr. --

21 **THE COURT:** Is the testimony correct or incorrect?

22 **THE WITNESS:** The testimony is incorrect here, with
23 that statement "cashier position." We recommended some changes
24 in both -- in both -- in some of the procedures that they were
25 using, as well as workstation changes. The workstation changes

1 would have been, here, with respect to the cooking area.

2 **BY MR. WOHL:**

3 **Q.** But that's not what the deposition says?

4 **A.** You're correct.

5 **Q.** Okay. And, in fact, at Brookshire cashiers don't sit; do
6 they?

7 **A.** No.

8 **Q.** And you don't recommend that they be provided with seats;
9 isn't that correct?

10 **A.** That's correct.

11 **Q.** Let's talk about Wal-Mart. Isn't it correct that in 2006,
12 long before you were designated an expert in these seats cases,
13 this one, all the other we talked about, you consulted with
14 Wal-Mart for the purpose to see whether their cashiers could
15 sit while performing their job duties?

16 **A.** It was to look at the advantages and disadvantages, the
17 constraints on doing that, yes.

18 **Q.** And for Wal-Mart, you considered whether they should be
19 provided with a seat or with a lean stool; isn't that correct?

20 **A.** They included a lean stool in that effort.

21 **Q.** Explain to the Court what a lean stool is.

22 **A.** A lean stool as opposed to a seat that you sit on or stand
23 without, a lean stool is a stool that you lean against, bracing
24 your legs on something below you.

25 **Q.** So it's not a seat, it's something you lean against; isn't

1 that correct?

2 **A.** It is, yes.

3 **Q.** And instead of your bottom supporting your weight, it's
4 actually the back part of your legs supporting your weight
5 against the lean stool, correct?

6 **A.** Yes. You're taking the weight off the legs and, at the
7 same time, allowing mobility of the upper torso to work.

8 **Q.** Is it correct that in performing your analysis for
9 Wal-Mart as to that issue you didn't consider what products the
10 cashiers handled, correct?

11 **A.** When you say --

12 **MR. MATTHEW RIGHETTI:** Your Honor, this Wal-Mart issue
13 does raise that confidentiality agreement again. And if we're
14 going to be back here tomorrow for more cross-examination, then
15 during the afternoon recess I can check Mr. Wohl's
16 representations that none of the -- that Wal-Mart, apparently,
17 is not interested in enforcing the confidentiality agreement.

18 Of course, if Dr. Johnson is ordered to answer questions
19 then -- I just don't want him getting crossways with Wal-Mart,
20 and getting sued by Wal-Mart by violating the confidentiality
21 agreement.

22 **MR. WOHL:** We have the deposition right here. Nowhere
23 is there anything about protective order, confidentiality, so
24 forth.

25 Wal-Mart was represented in the case because it was

1 brought against Wal-Mart. We are prepared to make a proffer or
2 offer testimony that we obtained this from the court reporter,
3 and specifically asked the court reporter, Is there any
4 confidentiality attached to this? We were told no.

5 **MR. MATTHEW RIGHETTI:** Mr. Wohl, apparently, obtained
6 a deposition transcript in the Wal-Mart matter without
7 notifying us. I wouldn't really care. But, more importantly,
8 without notifying Wal-Mart or its attorneys. And the court
9 reporter gave it to him.

10 Now, Wal-Mart, apparently, doesn't know, and I just found
11 out that Mr. Wohl obtained this transcript without notifying
12 Wal-Mart or its counsel. So the fact that he got the
13 transcript doesn't necessarily mean that Wal-Mart is waiving
14 the confidentiality agreement with regard to Dr. Johnson.

15 **MR. WOHL:** Your Honor, this becomes surreal. They
16 clearly disclosed everything about Dr. Johnson's work to
17 plaintiff's counsel, who was suing them for a seats claim. So
18 the idea that somehow, in Wal-Mart's mind, well, we'll keep it
19 confidential as to everybody else except these plaintiffs,
20 makes no sense.

21 But, in any event, the deposition the speaks for itself,
22 your Honor. There's no confidentiality or protective order.

23 **THE COURT:** Can I see the transcript?

24 **MR. WOHL:** Yes, Your Honor.

25 **THE COURT:** First, show it to counsel. Counsel, have

1 you seen it?

2 **MR. MATTHEW RIGHETTI:** Yes.

3 **MR. WOHL:** It's their offer when they took the
4 deposition. So, of course, they've seen it.

5 **MR. MATTHEW RIGHETTI:** We took the deposition by
6 subpoena. He wasn't an expert in this case. He was a fact
7 witness.

8 **THE COURT:** You should know, as counsel in that case,
9 Mr. Righetti, whether or not there's some other order someplace
10 that keeps this transcript under seal.

11 **MR. MATTHEW RIGHETTI:** Charlie Jones' office is
12 handling that case. And I intend, when we're finished here
13 today, to go over that with him.

14 **THE COURT:** Are you counsel in that case?

15 **MR. MATTHEW RIGHETTI:** I am an attorney in that case,
16 but I did not handle that deposition. I've never personally
17 read that deposition.

18 **THE COURT:** Yes, but you know about this witness.
19 This is an obvious issue to -- you brought it up yourself. You
20 could have checked all this out before we came here today.

21 **MR. MATTHEW RIGHETTI:** Yes. Theoretically, I could
22 have. I don't have a bone to pick. I'm not trying to hide
23 anything or prevent anything from coming out. I just don't
24 want Dr. Johnson getting crossways on a confidentiality
25 agreement that Wal-Mart had him sign before he did work at

1 Wal-Mart. That's my only consideration. We're not trying to
2 hide anything about Wal-Mart.

3 **MR. WOHL:** I think what Mr. Righetti is saying, if you
4 simply instruct the witness to answer my question then
5 everything is fine because then he's doing it based on the
6 judge's direction, and Wal-Mart would surely have no cause or
7 complaint about that.

8 **THE COURT:** Just a minute.

9 (Pause.)

10 **THE COURT:** Well, in the word index at the back I've
11 looked for the words "confidentiality," "protective" and
12 "order." I don't see those at all.

13 I've looked through the transcript to see if there's any
14 indication that something is secret. And I don't see that.

15 So, as far as I can tell, this is a public document that
16 has no confidentiality requirement, whatever. And the
17 defendant was represented at the deposition by Littler
18 Mendelson, it says here --

19 **THE WITNESS:** Excuse me, sir. I was not represented
20 by her.

21 **THE COURT:** It says the defendant was represented.

22 **THE WITNESS:** I wasn't the defendant. I was a fact
23 witness.

24 **THE COURT:** Yes, you were the witness.

25 **THE WITNESS:** Oh, I was? The person from Wal-Mart was

1 representing me?

2 **THE COURT:** No. I said the defendant. Were you the
3 defendant in that case? No. You were supposed to be a
4 witness. But the defendant was Wal-Mart.

5 So Wal-Mart was present and had every opportunity to say
6 something in here is secret. So the witness will be ordered to
7 answer anything and everything that is covered by this
8 deposition.

9 Now, if it's a different subject, I don't know. If the
10 witness says -- do you have -- do you have some confidentiality
11 agreement with Wal-Mart?

12 **THE WITNESS:** I had a confidentiality -- as part of
13 that effort, there was a confidentiality agreement signed.

14 **MR. MATTHEW RIGHETTI:** I believe the confidentiality
15 agreement is an exhibit to that deposition, your Honor.

16 **MR. WOHL:** But, your Honor --

17 **THE COURT:** What exhibit number is that?

18 **MR. WOHL:** I'll take a look for you. I would
19 represent I would only be asking him things disclosed in the
20 deposition. So I think I'm tracking exactly what you're
21 suggesting would be the right way to --

22 **THE COURT:** Here's the answer. Mr. Righetti, it's not
23 under seal. It's in the public domain. Your objection is
24 overruled.

25 The witness will be ordered to answer these questions. If

1 he doesn't, I may strike the entirety of his direct.

2 **MR. MATTHEW RIGHETTI:** That's all I ask, your Honor.
3 Thank you. That's fine.

4 **THE COURT:** Thank you.

5 Do you understand what I just said?

6 **THE WITNESS:** I do, sir.

7 **THE COURT:** I'm handing back this deposition.

8 **MR. WOHL:** Thank you, Your Honor.

9 **THE COURT:** We're going to move on.

10 **MR. WOHL:** Appreciate your attention to that. Thank
11 you.

12 **BY MR. WOHL:**

13 **Q.** Dr. Johnson, let's resume. My question was -- I'll ask
14 the question one more time.

15 **A.** Is it allowed, can I modify my response relative to
16 Brookshire? While you were talking about that --

17 **THE COURT:** Go ahead.

18 **THE WITNESS:** It was footrests. I did recommend that
19 they put some footrests at that workstation. There was nothing
20 at the top or the other side. There were footrests, and at the
21 time there was a footrest that I was addressing.

22 **THE COURT:** Thank you.

23 **BY MR. WOHL:**

24 **Q.** Again, not seats?

25 **A.** Pardon?

1 Q. Not seats?

2 A. No, no, it was not seats. But I was trying to figure
3 out -- that statement bothered me, okay.

4 Q. Okay.

5 THE COURT: Next question, please. Let's move on.

6 MR. WOHL: I'm trying to. Thank you, Your Honor.

7 BY MR. WOHL:

8 Q. So, again, my question was, in performing your analysis
9 for Wal-Mart about whether cashiers could either use a seat or
10 a lean stool, you did not consider what actual products they
11 handled through the checkout process; isn't that correct?

12 A. I did not analyze that, no.

13 Q. Specifically, you didn't consider the products, the types
14 of products, the weight or the sizes of the products that the
15 cashiers handled, correct?

16 A. Now, when you're saying "consider," I did consider from
17 the standpoint of observations and watching. I did not
18 document it in any form.

19 Q. Not whether you documented it or not. Whether it played
20 any role in your analysis about whether they could use a seat
21 or a lean stool.

22 A. What they were handling was part -- when you say analysis,
23 what they were handling could -- was considered, but I did not
24 have enough knowledge of what that was. I did not take data on
25 that. All I did was observations. I did not have that

1 information.

2 **Q.** I'm going to read from your deposition in the *Brown vs.*
3 *Wal-Mart case*.

4 **MR. WOHL:** And I guess I'll just read the whole
5 paragraph, your Honor, that's just as well.

6 **THE COURT:** Read the question. Tell us page and line
7 and date of the deposition.

8 **MR. WOHL:** Yes. I'm going to do that, your Honor.
9 Again, this was taken on April 13, 2011. I'll read from
10 question starting on page 24, line 21, through page 25, line 9.

11 **"QUESTION:** Okay. And could you just describe for me,
12 generally, what you -- what you did for Wal-Mart back
13 in 2006-2007.

14 **"ANSWER:** Okay. I -- the goal -- the goal was to look
15 at the possibility of using a seated or lean stool
16 during the performance of the cashier's task. And so
17 what I did was, I went in and analyzed the job from
18 the standpoint of the geometry of the job, the
19 people, and then -- and looked at rather the
20 feasibility of -- of doing that. Now, an important
21 aspect is that I did not get -- at that point, the
22 next step in this was to look at what frequency and
23 what types of products would be used -- would be.
24 And I did not analyze the products, types -- the
25 types of products, weight, sizes and so on of the --

1 of the product that was not -- that was not part of
2 the project."

3 **THE WITNESS:** That's consistent with what I said.

4 **THE COURT:** Do you stand by what counsel just read?

5 **THE WITNESS:** I do.

6 **THE COURT:** Thank you. Next question.

7 **MR. WOHL:** Thank you, sir.

8 **BY MR. WOHL:**

9 **Q.** And isn't it correct that that ordinarily would have been
10 part of your ergonomic analysis?

11 **A.** If it would have gone further, yes.

12 **Q.** And, in fact, if you had considered the products the
13 cashiers handled, that could have had an impact on whatever
14 analysis or recommendation you came out with; isn't that
15 correct?

16 **A.** Yes.

17 **Q.** Isn't it also correct that you did not know the frequency,
18 duration, and interval of the Wal-Mart cashiers being required
19 to move from a lean or seated position?

20 **A.** Yes, that was not considered.

21 **Q.** That information also would have been critical to your
22 analysis; isn't that correct?

23 **A.** Yes. I wasn't coming up with a conclusion on whether -- I
24 was talking about the advantages and disadvantages, what
25 aspects were advantages and disadvantages for seating at that

1 point. I did not come to a conclusion about that.

2 Q. I understand.

3 A. So to come to a conclusion relative to what you're saying,
4 yes.

5 Q. That would have been crucial to your analysis, if you had
6 come to a conclusion. That's what you're saying?

7 A. To come to a conclusion would have been required.

8 Q. Okay. Is it correct that in connection with your work for
9 Wal-Mart in this project, you recommended that it consider --
10 not that it actually use, but that it consider using a lean
11 stool?

12 A. Yes.

13 Q. And you did not recommend that it consider using a seat;
14 isn't that correct?

15 A. The option -- the -- by the time I got done, the option
16 was -- for their particular situation, was a lean stool as
17 opposed to a seat, yes.

18 Q. That was your recommendation to them as to what it should
19 focus on or consider; isn't that correct?

20 A. It wasn't a start and finish. This was a lot of
21 interaction with Wal-Mart people. This went through a number
22 of presentations and discussions in the meantime. So there was
23 input from Wal-Mart with respect to that, as well.

24 Q. But what you told Wal-Mart was, you would not recommend
25 they consider using a seat for the cashiers; isn't that

1 correct?

2 **A.** I don't recall saying that, that they would not. I don't
3 recall that that was a -- a statement.

4 **Q.** You told Wal-Mart that it should consider using a lean
5 stool instead of a seat; isn't that correct?

6 **A.** Yes. The conclusion that we had come to as -- like I say,
7 this was not a one-sided situation. This was a situation where
8 I was dealing, as I usually do, with a company and with their
9 engineers.

10 **Q.** And there were two reasons, in your mind, why you did not
11 recommend that they consider using a seat for the cashiers;
12 isn't that correct?

13 **A.** Uhm, again, I haven't read that -- I don't recall that
14 part right now.

15 **Q.** Let me take you through the reasons first.

16 **A.** Okay.

17 **Q.** Then we'll go to depo if we have to.

18 **A.** Okay.

19 **Q.** One reason you identified is that if the employee has
20 upper motion in the torso, a lean station works better than a
21 seated workstation?

22 **A.** That's correct.

23 **Q.** And the other reason is that if a person must periodically
24 get up to do other activities, it's easier to get up and off a
25 lean stool or slide off a lean stool and slide back on than it

1 is to get off a chair. Correct?

2 A. Yes.

3 Q. With a chair, the employee has to move it out of the way,
4 which is much more awkward?

5 A. No. Depends on -- depends on where the chair would be or
6 how it would be configured.

7 Q. Is that what you told Wal-Mart, that if you had a chair,
8 it would be -- it would not be desirable because the employee
9 would have to move it out of the way, which was much more
10 awkward?

11 A. What was the first part of that statement?

12 Q. All right. So we're tracing through. I'll step back.

13 A. Okay.

14 Q. We're tracing through the two reasons that you had --

15 A. Okay.

16 Q. -- why you did not recommend to Wal-Mart that they
17 consider using a seat rather than using a lean stool.

18 A. Okay.

19 Q. Are you with me so far?

20 A. Yes.

21 Q. And the first reason was because when you have a position
22 with a lot of upper motion in the torso, the lean station works
23 better than the seated position, correct?

24 A. Yes.

25 Q. And the other reason was that if the employee, in

1 performing his work duties, has to periodically get up to do
2 those other activities, it's easier to get up and off of a lean
3 stool or to slide off of a lean stool than it is to get off of
4 a chair?

5 **A.** Yes. It is easier to get off of a lean stool.

6 **Q.** And that with a chair, the employee has to move it out of
7 the way, which is much more awkward for the employee to do,
8 correct?

9 **A.** It depends on what they're doing in that area, but that
10 could be the case, yes.

11 **Q.** Isn't it correct that you also told Wal-Mart that, in your
12 experience, a cashier would use a lean stool only 20 to 40
13 percent of the time?

14 **A.** Again, that would depend on the individual. Are you
15 talking about due to the -- again, remember, this was not a --

16 **THE COURT:** Wait, wait.

17 **THE WITNESS:** I didn't have enough data to make the
18 analysis.

19 **THE COURT:** Wait a minute. He's asking you a question
20 where you can say, yes, I did say that, or, no, I didn't say
21 that, or, I just don't remember what I said. You don't -- this
22 is not an occasion, on cross-examination, to give a speech.

23 So, did you say that, is all he's asking.

24 **THE WITNESS:** Repeat --

25 **THE COURT:** Did you say that to Wal-Mart?

1 **THE WITNESS:** If you would repeat the question.

2 **BY MR. WOHL:**

3 **Q.** Certainly, sir.

4 Isn't it true that you told Wal-Mart that, in your
5 experience, a cashier would use a lean stool only 20 to 40
6 percent of the time?

7 **A.** What was the -- before that, without knowing what the
8 context is, in terms of the --

9 **Q.** I'll read your deposition testimony, Dr. Johnson.

10 **A.** Okay. I mean, I'm not doubting that I made that statement
11 right there. It's what was the context before that statement.

12 **THE COURT:** All right. Read the page and line first.

13 **BY MR. WOHL:**

14 **Q.** All right. So this references an e-mail -- should I show
15 you the e-mail, first? Would that cut to the chase?

16 **A.** That would help.

17 **MR. WOHL:** That might be quicker, your Honor.

18 **BY MR. WOHL:**

19 **Q.** I'm going to show you -- this was an exhibit in the
20 deposition. This was an e-mail that you had sent to a
21 Ms. Linda Whittaker, of Wal-Mart's legal department, on
22 February 9 of 2007.

23 **MR. WOHL:** Your Honor, would you like a copy, as well?

24 **THE COURT:** No, I don't want one. I want you to mark
25 that as an exhibit so the record will be clear.

1 MR. WOHL: All right.

2 THE COURT: What is that going to be?

3 MR. WOHL: What is that going to be?

4 THE COURT: We'll mark it at the end of this sequence
5 of questions.

6 MR. ADKINS: 375.

7 MR. WOHL: 375, your Honor.

8 MS. SOMMERFELD: 377.

9 MR. WOHL: 377, your Honor.

10 THE COURT: Thank you. All right. Has the witness
11 read it?

12 THE WITNESS: Yes.

13 THE COURT: What's the question?

14 BY MR. WOHL:

15 Q. So, first off, since we're laying a foundation,
16 Dr. Johnson, do you recognize this to be a e-mail that you sent
17 to Linda Whittaker on February 9, 2007?

18 A. Yes.

19 Q. And this was in connection with your consulting work with
20 Wal-Mart that we've been talking about, correct?

21 A. Yes.

22 Q. And Ms. Whittaker was an in-house lawyer at Wal-Mart,
23 correct?

24 A. Yes.

25 Q. And if you go to the -- one, two, three, four, five --

1 fifth paragraph of the e-mail, could you read that into the
2 record, please.

3 **A.** (As read:)

4 "My experience with this design has indicated that
5 people try to set them so that they can sit or -- sit
6 on the seat. Notice the -- notice --"

7 That is the right spot?

8 **Q.** No, it's not. I said fifth paragraph. So I'll begin it
9 for you.

10 "My belief is that ..."

11 **A.** Oh.

12 "My belief is that most of the people will use the
13 lean stool 20 to 40 percent of the time, particularly
14 between customers. This is sufficient to -- to
15 rest -- provide rest, recovery of the legs, standing
16 and leaning configuration, yes."

17 **Q.** So it is correct that, in your experience, you thought
18 that even if you provided a lean stool, the cashier would only
19 use it 20 to 40 percent of the time, correct?

20 **A.** Yes. This is in the context of I do not think that this
21 is stable enough laterally. This is in the context of
22 evaluation of that particular lean stool, yes.

23 **Q.** Well, is it this particular lean stool, or in general lean
24 stools?

25 **A.** This was in the context -- the response was relative to

1 this particular lean stool. But, I'm not sure I would disagree
2 with that otherwise.

3 Q. And you noted that that would be particularly true, that
4 is, using the lean stool would be more likely to happen between
5 servicing customers, correct?

6 A. Yes.

7 Q. Therefore, when they are servicing customers, they would
8 be off of the lean stool to service the customer; isn't that
9 correct?

10 A. Not necessarily.

11 Q. That's not what you meant by saying particularly between
12 customers?

13 A. I'm not saying that they would be off of the stool. I
14 still think they -- again, what you're asking me is what
15 conclusions I was drawing. And I did not draw any conclusions
16 in this particular analysis. There were many other things.
17 This is related to this particular stool. And the point was
18 that even if they used it 20 to 40 percent of the time, or
19 whatever the percentage was, that that would be sufficient for
20 recovery.

21 Q. But, again, you thought they would use it only 20 to 40
22 percent of the time, correct?

23 A. Yes.

24 Q. And would use it particularly between customers, meaning
25 between serving customers, correct?

1 A. No. It will be available to them between customers.
2 That -- it does not say in here they will only use it between
3 customers.

4 Q. I didn't say "only." I said "particularly," correct?

5 A. Yes, that's in fact one of the times it will be used, is
6 between customers, yes.

7 Q. You also told Wal-Mart that a swivel seat has more
8 disadvantages than advantages when moving products laterally,
9 correct?

10 A. That's correct.

11 Q. With a swivel seat, the cashier has to lock his legs to
12 exert enough force to move the products across the counter to
13 prevent the swiveling, correct?

14 A. Are you asking did I say that?

15 Q. Yes.

16 A. Yes.

17 Q. And that's, in fact, true, correct?

18 A. Yes. Depends upon the resistance of the swivel.

19 Q. So you --

20 A. You can set it up -- which we did with Aldi -- so that the
21 resistance is higher, to reduce back problems, but, yes.

22 Q. You told Wal-Mart that if the cashier has to move items
23 laterally, it's better not to use a swivel seat, correct?

24 A. Are you asking -- yes.

25 Q. You also told Wal-Mart that, quote, I also do not think a

1 seat provides the upper torso mobility necessary to handle the
2 larger items. Correct?

3 A. There are items, yes, that's correct.

4 Q. You also told Wal-Mart that your opinion was that a seated
5 posture would not receive as positive a response from both
6 management and customers, correct?

7 A. As a what?

8 Q. Do you want me to repeat that?

9 A. Yes, but --

10 Q. You told Wal-Mart --

11 A. Okay.

12 Q. -- that your opinion was that a seated posture would not
13 receive as positive a response from both management and
14 customers?

15 A. As what?

16 Q. Do you want me to show you the e-mail where you said that,
17 Dr. Johnson?

18 A. Yes.

19 THE COURT: Is that the same e-mail?

20 MR. WOHL: Different e-mail.

21 THE COURT: I've been searching through here and not
22 finding what you are referring to. This is --

23 MR. WOHL: 378, your Honor.

24 THE COURT: Are you offering 377 in evidence?

25 MR. WOHL: Yes, I am, your Honor. Thank you.

1 **THE COURT:** Is there any objection to 377? Hearing
2 none, 377 is received.

3 (Trial Exhibit 377 received in evidence.)

4 **MR. WOHL:** Your Honor, I am presenting Dr. Johnson
5 with Exhibit 378.

6 **BY MR. WOHL:**

7 **Q.** Again, to lay our foundation, do you recognize Exhibit 378
8 as, in fact, two e-mails? One -- well, there's actually even
9 more e-mails. So just to pick up the track here, if you turn
10 to page 124 of the exhibit, the bottom Dr. Johnson.

11 **A.** Oh, I'm sorry. On page 124?

12 **Q.** Yeah. Just for the record, this is your typical email
13 chain where oldest e-mail is on the bottom and newest is on the
14 top. Correct? I'm sorry, correct?

15 **A.** Yes.

16 **Q.** Great.

17 So the e-mail at the bottom was an e-mail that was sent
18 from Packard Industries to kray@officesource.com, dealing with
19 a proposal by Packard Industries to proceed with two prototypes
20 for the Wal-Mart project that you were working on. Correct?

21 **A.** Okay, yes.

22 **Q.** Is that correct?

23 **A.** Yes.

24 **Q.** And then Kirk Ray, to whom this e-mail was addressed, then
25 passed it along to Linda Whittaker at Wal-Mart, correct?

1 A. Yes.

2 Q. And then Linda, in turn, passed it along to you?

3 A. Yes.

4 Q. And her e-mail passing along to you is what appears at the
5 bottom of page 123, that is the first page of the exhibit?

6 A. Yes.

7 Q. And Ms. Whittaker wrote:

8 "Please let me know what you think. I am thinking we
9 ask for only the one it will do at no cost."

10 And the one that they will only do at no cost was the
11 seat.

12 "Unless you think the other sounds more likely to
13 satisfy our needs."

14 And the other one was a lean stool, correct?

15 A. Yes.

16 Q. Okay. So then in the top email, which is the last one in
17 the chain, you respond to Ms. Whittaker, correct?

18 A. Yes.

19 Q. You state, one, two -- five paragraphs down, quote:

20 "My opinion is that a seated posture would not receive
21 as positive a response from both management and
22 customers. I also do not think it provides the upper
23 torso mobility necessary to handle the larger items.
24 But if it's free" -- meaning that the manufacturer
25 was offering it as a free prototype -- "it might be

1 worth a try."

2 That's what you wrote to her, correct?

3 **A.** Yes, that's correct.

4 **Q.** And your statement in that e-mail, that you thought it
5 would not receive as positive response from both management and
6 customers if a cashier at Wal-Mart sat, was based on your
7 conversations with Wal-Mart customers; isn't that correct?

8 **A.** No. Well, wait just a second. This -- this is they would
9 not be as --

10 **Q.** Would not receive as positive a response?

11 **A.** As with a lean stool. So what we're comparing it against
12 is against a lean stool. Okay. I want to make sure I'm
13 understanding.

14 **Q.** Right. But seated cashier, you wrote to Wal-Mart, in your
15 opinion, would not receive as positive a response from both
16 management and customers. You made that statement to Wal-Mart,
17 correct?

18 **A.** Yes, in the context of compared to a lean stool.

19 **Q.** And that was based on your conversations with Wal-Mart
20 customers, correct?

21 **A.** I'm trying to think of what the -- I did not analyze --
22 this would have been discussions with them. But I did not
23 document discussions. I did not do a survey of customers.

24 **Q.** I'll read from your deposition, again, in the same case,
25 starting at page 138, line 12, and continuing through 139, line

1 3. I did say 12, yes.

2 "QUESTION: Okay. All right. The next paragraph
3 says" --

4 And this is referencing the same e-mail.

5 A. Okay.

6 Q. (As read:)

7 "-- quote, my opinion is that a seated posture would
8 not receive as positive a response from both
9 management and customers. End quote. What was the
10 basis --"

11 You interject:

12 "ANSWER: Very --

13 "QUESTION: -- for that opinion?

14 "ANSWER: That -- that it's just totally -- I should
15 have used the belief -- the word belief probably
16 there because that -- that was -- actually, I did. I
17 talked to some customers as they were coming through.
18 And I talked to a lot of the others, as well, about
19 would the -- would the seated posture give the
20 impression of Wal-Mart not being as good of service.
21 And -- but that was just casual talking to them. And
22 that -- and that's one of the things -- and I would
23 like to read this in terms of where the next -- where
24 the project would go next, if we would complete that.
25 But a survey of nature is something that would have

1 been needed to be -- had to be done to look at the
2 total feasibility --

3 **"QUESTION:** My --

4 **"ANSWER:** -- of the project."

5 Okay?

6 **A.** Yes.

7 **Q.** So we see a pattern.

8 **A.** I agree.

9 **Q.** We have lawyers and witness talking over each other even
10 in the deposition there.

11 **A.** But I don't disagree with that statement.

12 **THE COURT:** Well, I need to ask. Do you stand by what
13 you testified to in the deposition?

14 **THE WITNESS:** Yes.

15 **THE COURT:** Thank you. Go ahead.

16 **BY MR. WOHL:**

17 **Q.** Now, the design for a lean stool you came up with wasn't
18 intended to fit everybody?

19 **THE COURT:** Can I ask a question?

20 **MR. WOHL:** Yes.

21 **THE COURT:** I wanted to ask the witness.

22 What is the difference between a seat and a lean stool?

23 **THE WITNESS:** May I draw it? May I draw a lean stool?

24 **THE COURT:** What are you going to draw it on?

25 **THE WITNESS:** Just the back of one of these.

1 **THE COURT:** It will have to be part of the record.

2 Give the witness a clean sheet of paper.

3 **MR. WOHL:** Handing the witness a pristine piece of
4 paper.

5 **THE COURT:** Draw us those two items so we'll have in
6 mind what you think the difference is.

7 **MR. WOHL:** May I see it too, your Honor?

8 **THE COURT:** Is that the lean stool?

9 **THE WITNESS:** That would be the lean stool.

10 **THE COURT:** Draw a seat, too.

11 **THE WITNESS:** Okay.

12 **THE COURT:** All right. The one on the left is the --

13 **THE WITNESS:** Lean stool.

14 **THE COURT:** All right. Counsel, for the record, mark
15 it as an exhibit.

16 So as you drew that, it does not have a back to it --
17 a seat does not have a back to it.

18 **THE WITNESS:** Not necessarily, no.

19 **THE COURT:** So I would have called that a stool, what
20 you drew as a seat. But you think that's a seat.

21 **THE WITNESS:** It is -- it would be called -- it's a
22 seat and a stool, yes.

23 **THE COURT:** All right. Okay. Thank you.

24 **MR. WOHL:** So, your Honor, if I haven't already, I
25 would like to move into evidence -- I don't know if I moved 378

1 as well, so 378 and 379.

2 **THE COURT:** 378, any objection?

3 **MR. MATTHEW RIGHETTI:** No, Your Honor.

4 **THE COURT:** Received.

5 (Trial Exhibit 378 received in evidence.)

6 **THE COURT:** 379 is the diagram; is that correct?

7 **MR. WOHL:** Yes.

8 **THE COURT:** Any objection?

9 **MR. MATTHEW RIGHETTI:** No, Your Honor.

10 **THE COURT:** Received. Go ahead.

11 (Trial Exhibit 379 received in evidence.)

12 **BY MR. WOHL:**

13 **Q.** Before the judge's question, my question to you,
14 Dr. Johnson, the design for a lean stool you came up with
15 wasn't intended to fit everybody; isn't that correct?

16 **A.** Was not intended?

17 **Q.** Was not intended. You didn't intend that that was going
18 to fit everybody who might have need to use it; isn't that
19 correct?

20 **A.** Yeah. I did not do dimensions. This was a concept.

21 **Q.** For example, a 400-pound person would not be able to use
22 that lean stool, correct?

23 **A.** Probably not.

24 **Q.** And wouldn't you agree that whether even the lean stool
25 would have been feasible depended on, among other things,

1 whether the cashier was responsible for loading merchandise
2 into the customer shopping carts?

3 **A.** Yes.

4 **Q.** In fact, you told Wal-Mart's counsel, in connection with
5 the deposition, that the need to load merchandise into the
6 customer shopping carts was a deal breaker for even using a
7 lean stool in the first place?

8 **A.** Yes.

9 **Q.** Now, following the work you did for Wal-Mart, Wal-Mart did
10 not install a lean stool for its cashiers; isn't that correct?

11 **A.** That's correct.

12 **Q.** It also did not install seats for his cashiers; did it?

13 **A.** I don't believe so.

14 **THE COURT:** May I ask a different question?

15 **MR. WOHL:** Yes, sir.

16 **THE COURT:** The work you did for Wal-Mart, were you
17 retained in Wal-Mart by the lawyers to be a litigation
18 consultant, or were you simply retained by Wal-Mart on a
19 business basis, to give advice?

20 I'm still unclear as to how you got involved in the
21 Wal-Mart case.

22 **THE WITNESS:** The Wal-Mart had nothing to do with
23 litigation at all. It was, I had some graduate students who
24 had gone to Wal-Mart and started to work, and the legal staff
25 asked them about whether this would be possible looking at it

1 from an ADA standpoint and other concerns. And then that's
2 when this got started. So this was a very small effort.

3 **THE COURT:** I got it. Thank you.

4 Continue on please.

5 **MR. WOHL:** Thank you.

6 **BY MR. WOHL:**

7 **Q.** And to this day, Wal-Mart cashiers continue to stand while
8 performing their job duties; isn't that correct?

9 **A.** Correct.

10 **Q.** And you're not recommending in this case that Kmart
11 install standing lean stools, correct?

12 **A.** I'm not recommending -- when you say, I'm not
13 recommending, yeah.

14 **Q.** Isn't one of the reasons why is that a lean stool would
15 have to be permanently installed in the floor to provide
16 stability, so that when the cashier leaned back he didn't fall
17 over? In other words, have to be bolted to the ground.

18 **A.** It doesn't have to be bolted down. We came up with some
19 other alternatives. But, yes, it has to be stable because the
20 important part of a lean stool is the ability to put your legs
21 up and take some of the weight off of the legs.

22 So there has to be a lateral force there. So it has to be
23 stable, yes. That's the disadvantage.

24 **Q.** And what that would mean then is that, permanently, the
25 lean stool would be in the way of the cashier if the cashier

1 needed to get up and move around the checkstand station?

2 **A.** No, I think that one of the alternative designs -- again,
3 these are all very preliminary -- was one that had the lean
4 stool this way, and then it would flip up, and the person could
5 stand in front of it comfortably.

6 **Q.** But in the Kmart configuration, that would put it too far
7 back. It wouldn't put the cashier close enough to the counter
8 to actually work while leaning against the lean stool, correct?

9 **A.** I have not analyzed this relative to the Kmart
10 workstation.

11 **Q.** And the reason why you have recommended a movable stool is
12 you thought, well, at least with a stool, they can move it
13 under the counter and get it out of the way if they need to
14 stand while performing their job duties, correct?

15 **A.** Okay. What is your question again?

16 **Q.** The reason why you've recommended a movable stool for
17 Kmart cashiers is that that way they can simply move it under
18 the counter and get it out of the way, so they can move around
19 in the space behind the counter?

20 **A.** As opposed to what?

21 **Q.** As opposed to a fixed lean stool, correct?

22 **A.** I never entertained a fixed lean stool.

23 **Q.** Okay. Let's change subjects.

24 **MR. WOHL:** Your Honor, we're still stopping at
25 1:00 o'clock today?

1 **THE COURT:** You have 14 more minutes.

2 **MR. WOHL:** Thank you, Your Honor.

3 **BY MR. WOHL:**

4 **Q.** In -- in your report, in your analysis of this case, you
5 cited your work for Aldi to show that it's obviously possible
6 to perform the checkout function in a seated posture with an
7 appropriately designed configuration, correct?

8 **A.** I would say that's correct.

9 **Q.** Is it accurate, therefore, to say that your conclusion
10 that it's possible to perform the checkout function in a seated
11 posture is contingent, is dependent on an appropriately
12 designed configuration?

13 **A.** When you say "appropriately designed," there are
14 configurations that you would not be able to sit.

15 **Q.** Right. And that's, actually, your phraseology. But
16 "appropriately designed configuration," we understand each
17 other. Correct?

18 **A.** Make the statement. Ask me the question again, if you
19 would.

20 **Q.** In order to have a checkout function performed in the
21 seated posture, there has to be an appropriately designed
22 configuration?

23 **A.** Yes.

24 **Q.** As an ergonomist, you wouldn't just place a chair in a
25 workplace without any consideration for such things as counter

1 height and length or reach distance, or bending and twisting
2 requirements, correct?

3 A. Now, are you talking about providing a chair for recovery,
4 for example, when they're not working?

5 Q. No. Providing a chair for them to actually perform their
6 work duties. You would never recommend, just throw a chair in
7 there and that would be fine?

8 A. Depends on where "there" was. But there would be
9 configurations that that would not work.

10 Q. Right.

11 And in this case, the reason why, as plaintiff's counsel
12 took you through all the changes that you propose making to the
13 existing checkout stand, is in an effort to make it
14 appropriately configured for a seat, correct?

15 A. Correct.

16 Q. And as I think you heard counsel reaffirm this morning,
17 unless you did it, those modifications or some other
18 modifications, a seat would not work at the checkout stand at
19 Kmart --

20 A. Again --

21 Q. -- for the employ to perform his job duties?

22 A. It would -- looking at this with what you have right now,
23 the person could sit down and do some of the job duties. But
24 that's not what I would certainly recommend.

25 Q. And it's correct, I think, as you testified previously,

1 you only looked at the work performed at the front-end cash
2 register, correct?

3 A. Yes.

4 Q. And the work that you looked at specifically was taking
5 the product from the customer?

6 A. Well, the customer puts it on the counter so, yes, taking
7 it from a customer.

8 Q. Scanning it?

9 A. Yes.

10 Q. Putting it in the bag?

11 A. That was part of it.

12 Q. And completing the transaction with the customer?

13 A. Those are all part of the transaction process, yes.

14 Q. You did not consider time spent away from the register as
15 being relevant to your analysis, correct?

16 A. No, I was looking at whether those tasks could be
17 performed in a seated posture.

18 Q. You did not consider how frequently the cashiers must
19 leave the checkout stand, correct?

20 A. No.

21 Q. With regard to the Aldi comparison that you've made, isn't
22 it correct that Aldi uses a conveyor belt?

23 A. Yes.

24 (Reporter interrupts.)

25 Q. Isn't it correct that Aldi uses a conveyor belt?

1 A. Yes.

2 Q. And there are no conveyor belts at Kmart in Tulare,
3 correct?

4 A. Correct.

5 Q. And at Aldi the customer bags his own groceries, correct?

6 A. Yes.

7 Q. And, generally speaking, that's not true at Kmart. The
8 cashier bags the merchandise, correct?

9 A. That's correct.

10 Q. Are you also aware that at Aldi the customer has to pay 25
11 cents for the right to use a shopping cart?

12 A. Yes.

13 Q. And to recover that 25 cents, he has to physically return
14 the shopping cart to where he got it, to get back that deposit?

15 A. Yes.

16 Q. Even if he doesn't take it with him, but he just leaves it
17 somewhere in the store, he loses his 25 cents, correct?

18 A. It's a very popular program. That's speculation.

19 Q. I'm sorry, what was that?

20 A. I'm sorry.

21 Q. Was that sarcastic?

22 A. No, no, no. Speculation. It's beyond my area of
23 expertise.

24 Q. But, in fact, aren't you aware that Aldi rates among the
25 bottom in customer satisfaction surveys in terms of service

1 that they receive from cashiers?

2 A. Did not know.

3 Q. Would that surprise you, given what you know about the
4 Aldi operation?

5 A. Yes.

6 Q. And when you were called to perform your work for Aldi,
7 they had also set up their system that their cashiers were
8 sitting, correct?

9 A. Correct.

10 Q. And you weren't called upon to assess whether sitting was
11 a good thing or bad thing. That was a given as part of the
12 job?

13 A. Correct.

14 Q. And your focus was on the stand, correct?

15 A. Yes.

16 Q. And whether improvements could be made to the standing
17 process, correct?

18 A. Yes.

19 Q. How high is the counter at an Aldi?

20 A. I don't have those data with me.

21 Q. Do you agree that, by definition, the counter at Aldi is
22 lower than the counter at a Kmart?

23 A. I don't have any -- I don't know.

24 Q. You don't know that?

25 A. I don't know that.

1 Q. Well, you recognize that the Kmart counter is designed for
2 standing, correct?

3 MR. MATTHEW RIGHETTI: Your Honor, are we talking
4 about Tulare or all Kmart's?

5 MR. WOHL: Thank you. Tulare.

6 BY MR. WOHL:

7 Q. You agree that the checkout stand at Kmart Tulare is
8 designed for standing?

9 A. Yes.

10 Q. And the checkout counter at Aldi's is designed for
11 sitting?

12 A. Yes, on a platform. They have the stools on top of a
13 platform. So there's the floor, then there's a platform, and
14 then there's the stool.

15 Q. But they're not sitting on a stool that's higher than a
16 regular chair, isn't that correct, at Aldi?

17 A. Well, the chair they're sitting on is higher than what you
18 would -- if it were from the floor, so that it's at the
19 comparable level.

20 What's your question, again?

21 Q. So you're saying that the -- by the way, you're saying a
22 stool, but there's a back rest at the Aldi stores; isn't that
23 right?

24 A. Yes.

25 Q. So it's really more like a chair than a stool, what we

1 would commonly refer to as a stool, correct?

2 A. That definition is okay.

3 Q. So even if it's sitting on an elevated platform,
4 nevertheless, it is the height of a normal chair that we'd see
5 in the courtroom or --

6 A. Yes.

7 Q. -- office settings. Correct?

8 A. Yes.

9 Q. And the modifications that you're preparing for Kmart
10 would be someone sitting in a stool that would be higher than a
11 regular chair, correct?

12 A. Yes.

13 Q. And that, as you explained, was because you want this to
14 be usable both by people who stand and by people who sit?

15 A. Yes.

16 Q. And in order to achieve the same distance of elbows and
17 shareholders above the counter, you necessarily have to raise
18 the person in a seated position to approximately the same
19 distance, as if they were standing. Correct?

20 A. No. No. What you're doing is you're raising them to the
21 point where their thighs are in contact with the bottom of the
22 counter. That's how you decide how high to raise them.

23 Q. But the point is that they will be -- their arms and
24 shoulders will be above the counter the way they would be above
25 the counter if they were standing?

1 A. Yes. Their arms and shoulders would be in a comfortable
2 posture.

3 Q. Because, otherwise, if you put them in a regular chair,
4 they would have to be up like -- and, for the record, I'm
5 raising my arms above my shoulders -- in order to get above the
6 counter because they are not sitting low to the counter,
7 correct?

8 A. You're talking about --

9 Q. A chair rather than an elevated stool.

10 A. When you say "elevated stool," it's 26 inches.

11 Q. Higher than a chair?

12 A. It is higher than a chair, but it is not --

13 Q. Just so we're clear --

14 A. -- would not use the word "elevated."

15 Q. -- the seat pan, which is the term used for where you
16 actually sit, would be higher off the ground than the type of
17 stool you're talking about than would the seat pan in a chair?

18 A. Yes.

19 Q. And that's necessary so that you bring the employee up so
20 that they can operate above the counter in a manner similar to
21 if they were standing?

22 A. Yes.

23 Q. Okay.

24 THE COURT: How high is a chair?

25 THE WITNESS: These are 18, probably. I don't know.

1 in that range.

2 **THE COURT:** How high is a stool?

3 **THE WITNESS:** Twenty-six. Eight inches higher.

4 **THE COURT:** Go ahead.

5 **BY MR. WOHL:**

6 **Q.** At Aldi, not only could the customers bag their own items,
7 but the cashier doesn't hand the items to the customer. Simply
8 moves them along. The customer both has to pick them up and
9 bag them, and then take them away. Correct?

10 **A.** Correct.

11 **Q.** When you looked at videos of Kmart cashiers at work, you
12 saw that 73 percent of the time, nearly three-quarters of the
13 time, they either would hand the bag of merchandise to the
14 customer or would actually put the bag of merchandise in the
15 customer's shopping cart. Correct?

16 **A.** That was at Prescott, not at Tulare.

17 **Q.** All right. But you've already told us they were the same
18 setups at the two stores, correct?

19 **A.** No. In fact, the geometry is different between the two
20 stores. I was saying -- when we're talking about that, when I
21 was looking -- when I did my report back then, at that point, I
22 didn't have all of the data.

23 And the only difference is, if I'm understanding
24 correctly, that the actual bag table is separated a little
25 more. So people tend to pile things on the demagnetizer, then

1 walk around and bag at the end of the demagnetizer, and put it
2 into the basket like this (indicating.)

3 The procedure was quite a bit different on how they did
4 the job at Prescott than it is at Tulare.

5 Q. Well, do you have any basis to say that in fact at Tulare,
6 as well, three-quarters of the time, at least, the customer
7 is -- the cashier is either handing the merchandise directly to
8 the customer or putting it in the customer's shopping cart?

9 A. No. I think I have those data in one of my reports that
10 is different from that.

11 Q. All right. Well, we'll talk about that later then.

12 At Aldi, did you ever have occasion to evaluate how
13 frequently cashiers had to get out of their seats?

14 A. No.

15 Q. Do you know whether they were responsible for moving from
16 checkstand to checkstand, to help other cashiers as need be?

17 A. No.

18 Q. Do you know whether they're responsible for standing away
19 from the checkstand, to invite customers who might be waiting
20 in line in a different checkout line, to come over to their
21 station?

22 A. No.

23 Q. And at Kmart you understand that cashiers frequently do
24 what I've just described?

25 A. I have not --

1 Q. You're not aware at Kmart cashiers will move from a
2 different line to help another cashier?

3 A. I have not observed that, but I've not looked for that.

4 Q. Or get out of their line to invite customers to move from
5 a crowded line to their open line; you are not aware of that?

6 A. Again, a majority of what I've observed relative to Kmart
7 was the overhead video that is looking straight down and does
8 not indicate where the person is going when they are going out
9 of the box.

10 Q. All right.

11 MR. WOHL: Your Honor, I was going to change to
12 another subject. Would it make sense to stop for today?

13 THE COURT: All right. This will be an okay place to
14 stop.

15 MR. WOHL: Thank you, Your Honor.

16 THE COURT: Dr. Johnson, you are on cross-examination
17 now, so no talking with counsel overnight. We'll see you back
18 here at 7:30 a.m., in the morning, please. So you can step off
19 the stand now and let me deal with counsel for a moment.

20 Please give those documents to counsel.

21 THE WITNESS: Okay.

22 MR. WOHL: Thank you Dr. Johnson.

23 THE COURT: Do the lawyers need me for anything? Any
24 way I can help you between now and tomorrow morning?

25 MR. WOHL: I think we're good, your Honor.

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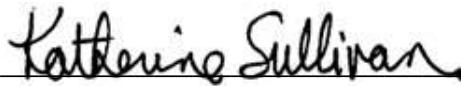
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CERTIFICATE OF REPORTERS

We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS,
Official Reporters for the United States District Court,
Northern District of California, hereby certify that the
foregoing proceedings in C 11-2575 WHA, **Lisa Garvey vs. Kmart
Corporation**, were reported by us, certified shorthand
reporters, and were thereafter transcribed under our direction
into typewriting; that the foregoing is a full, complete and
true record of said proceedings at the time of filing.

DATE: Tuesday, November 13, 2012



Katherine Powell Sullivan, CSR #5812, RPR, CRR
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